[2025] JMCC Comm 153

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00514

CLAIM NO. SU2020CD00407

(CONSOLIDATED)

BETWEEN NUBIAN-1 CONSTRUCTION LIMITED 1st CLAIMANT

COMPLETE DEVELOPMENT SOLUTIONS LIMITED 2nd CLAIMANT

AND EDGEHILL HOMES LIMITED DEFENDANT

Contracts – For project management – For construction – Residential scheme of development – Variation to number of units, infrastructure, supply of finishes, among other things – Whether delay caused by employer or contractor – Whether inadequacy of aerial topographical survey a cause – Whether employer, contractor or project manager to blame – Whether defective or incomplete works – FIDIC contract- Interpretation and application – Whether contracts properly terminated – Consequence of breach- Damages.

Jacqueline Cummings and Clifton Campbell instructed by Archer Cummings & Co. for the 1st Claimant

John Graham KC and Peta Gay Manderson instructed by John G. Graham & Co. for the 2nd Claimant

Kwame Gordon and D'Andria Butler instructed by Samuda & Johnson for the Defendant

Heard: 12th ,13th ,14th, 15th, 16th, 19th, 20th ,21st June & 4th October 2023; 13th, 14th, 15th, 16th May; 24th, 25th, July; 1st November 2024; 17th January, 28th March, 14th April & 19th December, 2025.

IN OPEN COURT Cor:

Batts, J.

INTRODUCTION

[1] On the first morning of trial counsel indicated there had not yet been an agreement on documents and that, on the 26th May 2023, "*new*" documents were served on the Defendant. The 1st Claimant also applied to amend its Statement of Case. There being no objection, the amendment was granted and the matter stood over to the 13th June 2025, for documents to be agreed if possible. In due course, six agreed bundles of documents were put in evidence as exhibits 1 to 6. In due course the Defendant would file an Amended Defence and Counterclaim, on the 17th May 2024, and a 2nd Amended Defence and Counterclaim, on the 19th June 2025, with the leave of the court.

[2] The claims are for money allegedly due and owing, to a builder and a project manager respectively, from a developer. The Claimants assert that they performed their contractual duties but were prevented from completing their obligations by the Defendant. The Defendant admits it terminated both contracts but says it was entitled so to do because of the Claimants' failure to deliver. The Defendant counterclaimed for loss due to poor workmanship and to late delivery and/or nondelivery of completed houses. The resolution of the largely factual issues turns in large part on the oral, expert and, documentary evidence. I will therefore first generally review the evidence of each party before stating my findings on the material facts. Thereafter I will reference the relevant terms of the contract, apply the law to the facts and, make orders accordingly.

THE EVIDENCE

[3] In opening remarks the 1st Claimant's counsel indicated that the contract with her client was signed on the 13th March, 2017 and, without objection, her Particulars of Claim were amended accordingly. The first witness called was Mr. Lenworth Kelly. He is a civil engineer (and a director of the 1st Claimant) whose witness statement, dated 3rd March 2023, as amended by him was allowed to stand as his evidence in chief. Importantly he defined *"retention"* as a sum retained from each payment certificate and put in a fund created by the employer from which under the engineer's instructions "*costs for defects*," may be deducted. A *"contractors levy*," the witness explained, is an amount equivalent to 2% of the amount on a contractor's certificate and sent to the income tax department to the contractor's credit.

[4] In his witness statement Mr. Kelly says that from the very beginning the Defendant caused several delays which, along with other factors outside of the 1st Claimant's control, made completion by 30th September 2019 impossible. The original agreement, he said, was for 297 housing units but the Defendant instructed that only 108 be built at first. This evidence related to the "phased" approach to the project about which more will be said later in this judgment. Mr. Kelly put forward a chart listing "*main causes of delay*" and the time consequence of each cause. Of note is the item "*the slow progress of infrastructure works (sewage, water supply, electrical conduits) was primarily due to the site being 90% rock base. And the complete infrastructure being redesigned*." The effective delay for that cause is listed as *"undetermined*." He states that during the project 29 certificates for payment were issued by the Quantity Surveyor, see exhibit 6 page 2. He says in paragraph 13 that the Defendant stopped the 1st Claimant from working and prior to that had not raised an issue related to defects. Any incomplete work he said was due to the Defendant preventing them doing it. He asserts that on the 26th July, 2019 they requested and obtained an extension of time to the 30th September 2019, see exhibit 2 page 1; exhibit 1 pages 65, 67 and 83; the latter being a letter dated 8th August 2019. However, the Defendant's failure to supply material and

information, made completion by that date impossible, see exhibit 1 page 88, site meeting minutes of 23rd August, 2019, and exhibit 1 page 98 a letter dated 2nd September 2019. In paragraph 18 of his witness statement Mr. Kelly indicates that by letter dated 26th September 2019, a further extension was formally requested, this letter was not put in evidence. The Defendant did not respond to the request but instead on the 30th September 2019 terminated the contract, see exhibit 1 pages 107 and 108. Termination was immediate. He stated that, as there were sums due to the 1st Claimant, it was entitled to and did withhold contractor documents, plant material and other work, as per Clause 15.5(b) of their contract. Mr. Kelly asserts that, by letter dated 16th October 2019, exhibit 1 page 108, the Defendant attempted to classify its act of termination of the contract as falling under sub clause 15.2 (c). The contract he said had already been terminated.

[5] Mr. Kelly says that the 1st Claimant suffered reputational loss and loss of profits. He said they were not paid for amounts certified in Certificates #29 and 30 totaling US$1,317,185.18 nor paid the retention money of US$1,829,347.31. A profit of $6,458,667.00 would have been made had they been allowed to complete. The total loss suffered is therefore $11,579,255.05, see Particulars of Claim filed on 20th December 1019.

[6] Mr. Kelly complains that after termination the Defendant did not allow for a walk through of the site to facilitate a joint assessment of the site and work done. By way of amplification he stated that as at the 30th September 2019, thirty-six units were practically completed and fifteen were awaiting inspection for practical completion. Thirty others were nearing completion. The rest were in various stages of completion. He denied ever receiving notification, as per contract, about any of the defects about which the Defendant now complains. The exchange continued:

> *"Q: Did you at any time receive a list of defects and a timeline to remedy those defects*
>
> *A: yes*
>
> *Q: what did you receive*

A: For practical completion inspections there is usually a list of minor defects that is given with it

J: In what form was that given.

A: It was transmitted as a paper.

Q: Aside from practical certificate list of the defects, did you receive from Defendant any other notification

A: No

Q: What did Nubian do in relation to the list of minor defects

A: We remedied the defects."

[7] I instructed that Mr Graham K.C. for the 2nd Claimant cross examine first. This was in fairness to Mr Gordon so he would have an opportunity to deal with any matters which may arise given the obvious affinity between the 1st and 2nd Claimants. Mr. Kelly, in answer to King's Counsel, explained that originally the intention as per contract was to build all 297 units one at a time using a vertical aluminium formwork system, see exhibit 3 p 263. He understood the changed instruction to be 108 units in consecutive order *'at first'*. The witness stated that "*Dunsire*" was the Defendant's representative on the project. Mr. Shawn Keeper, someone he called "Q", and Derrick McDonald were Dunsire's representatives and attended site meetings. Dunsire was to supply finishes, materials, including bathtubs, shower doors, basins, faucets, toilets, locks, hinges and tiles (floor and wall). Originally these were to be supplied by the 1st Claimant but they were later told it would be done by Dunsire.

[8] In further answer to Mr Graham KC the witness explained that the Bills of Quantities provided lead them to believe the underground soil was not rock. They were therefore unaware when the project started of the extent and density of soil. They were later told a redesign of the units was necessary. In June 2017 therefore, construction stopped until November of that year with respect to lots 86 to 112.

They never restarted. The witness explained in more detail the problem with finishes. In particular doors chosen by Dunsire were unsuitable for external use. They had to be changed. This resulted in difficultly sourcing doors. Also, bathtubs supplied by Dunsire were larger than the ones specified and so walls and floors had to be cut to make adjustments. The witness details several other such redesign issues.

[9] Cross examination by Mr Gordon was thorough. The witness explained the disconnect between the contractual provision for construction on a phased basis and the instruction to build only 108 units *"at first*." He says it affected construction schedules because they would have done infrastructure works in advance for other phases of construction. He identified exhibit 3 page 38 as the construction schedule proposed by the 1st Claimant. The witness admitted that although a site inspection was done they had not, prior to the contract, taken or done soil sampling. This was contrary to a term of the contract which said *"The Contractor is to visit the site, inspect and decide for himself the nature of the ground and subsoil to be excavated.."* , see exhibit 2 page 110. He was asked about this:

> *"Q: It is important before signing contract to do inspection of earth and beneath to know what work will entail*
>
> *A: To degree that that can be facilitated*
>
> *Q: You were bidding for contract*
>
> *A: Yes"*

[10] When asked whether the minutes of site meetings and reports reflected that Defendant was cause of delay the witness answered in the affirmative. He however indicated that those words were not expressed:

> *"Q: Anything in report to lead one to conclude that from onset Defendant cause of numerous delays*
>
> *A: If you understand construction then you would understand.*
>
> *Q: Show me and explain*

A: See page 97 exhibit 3 "redesign of infrastructure ongoing …". Nubian would have received contract drawings. That tells Nubian what is to be built within first month all of that infrastructure had to be redesigned. It nullified contract drawing.

Q: Redesign was responsibility of architect.

A: No

Q: Infrastructure drawing are architect's responsibility

A: No

Q: Who prepared them

A: The Civil Engineer

Q: Edge Hill was not civil engineer

A: Yes

Q: Show me where EdgeHill was reason for Nubian's substantial delays from onset of contract

A: Edgehill would have engaged the civil engineer to do design. By contract EdgeHill provided us with these drawings by their agents. So Edgehill is responsible for what was supplied."

[11] The witness admitted that the extension of the date to complete phase one, to 30th September 2019 was to be the '*final extension'*. He said however it was subject to conditions, see minutes of meeting on 18th July 2019, exhibit 5 page 445. The definition of practical completion, as stated in the meeting, was not one with which he agreed. He had, however, not voiced his objection in the meeting. An email of 25th July 2019, exhibit 1 page 65, stated there would be no more extensions. A letter dated 8th August 2019 stated that previously issued practical completion certificates were to be retracted by mutual agreement, see exhibit 1 page 83. The witness denied this meant there were no practical completion certificates.

"Q: Why let us say mutual agreement to retract previously issued certificates… What was effect

A: Letter said mutual agreement. We never did because contractor cannot overturn a practical completion certificate. What makes it effective is the approval and issue by architect. That would be the party that have to retract.

Q: So letter is incorrect

A: Yes it is"

[12] Exhibit 1 pages 130 to 170 is a report on the project, by Dunsire Developments Inc (hereinafter referred to as Dunsire), with which the witness expressed disagreement. He was taken through the report and carefully pointed out inaccuracies. The witness was shown a document marked 'A' for identity (later became exhibit 12(a)). He said the photographs displayed at page 20 (of that report) did not accurately reflect the work they had done as at 30th September 2019. He was taken extensively through the document. Mr. Kelly impressed me as he appeared to honestly try to recall and accurately respond to the questions posed.

[13] On the morning of the 18th June 2023 counsel indicated that it was agreed that the Defendant was liable to the 2nd Claimant for invoices # 30 and 31. These were not put in evidence but total US$69,096.77 (USD51000+ USD18,096.77). Invoice no. 32 for US$334,360.24 remained in issue. It relates to deferred payments. The Defendant claimed to set off any liability to the Claimants against the loss it suffered due to their delay and poor workmanship. When re-examined Mr Lenworth Kelly said he was never told why he was instructed to stop working on the club house or pool. He explained the circumstances of termination and the courts injunctive orders after the contract was terminated.

[14] On the 19th June 2023 at 2:00 p.m the 2nd Claimant was permitted to interpose its first witness. He was Mr. Paul Williams the Managing Director of the 2nd Claimant, an engineer and project manager. His witness statement of the 14th October 2022

stood as his evidence in chief. It is ninety-two paragraphs long. He asserts that since 2007 efforts had been made to get the Gates of Edge Hill Housing Development on the way. The Defendant's plan of development, for 297 single family residences, two club houses and a jogging trail, in a gated community, was the third attempt. Edge Hill Homes Limited (the Defendant) was the developer and Morrison Financial, a Canadian company, was the financier. The 2nd Claimant was selected as project manager after a tender process involving three other bidders. Thereafter the 2nd Claimant and the Defendant entered a project management contract dated 11th October 2016.

[15] Mr. Paul Williams stated that during the period of the contract (originally two years but '*informally extended*') the 2nd Claimant provided monthly progress reports, see exhibit 3 page 3 to 832; exhibit 4 pages 5 to 50, 52 to 111, 14 to 218, 220 to 248 and, 276 to 492.; and exhibit 5 pages 1 to 322 and 415 to 439. Construction began on or about the 20th March 2017 but variations occurred because the aerial topographic survey, provided by the Defendant, did not accurately reflect the situation on ground. Significant variations involving infrastructure redesign were required and the Defendant delayed for several months before approving the variations. Also, when asked to confirm the finishes schedule the Defendant engaged a Canadian consulting company Dunsire Inc. to work along with the 2nd Claimant. The Defendant also changed the construction plan from a continuous construction program to construction in phases. This further affected the time for completion as well as the estimated cost and sequencing of the work without the necessary addendum to the contract.

[16] Mr. Paul Williams stated further that in 2018 the Defendant postponed all work on lots 90 to 110 and all work west of the natural gully was stopped. This was 66% of the works under the contract. The Defendant also changed the budget without consultation and took over procurement of finishing material. These did not, he says, become available until February 2019. The Defendant stopped communicating directly with the 2nd Claimant and routed all communication through Dunsire which was designated the client's representative. By November

of 2018 the Defendant had only authorized 53 of the 294 houses for completion since the start of the project in March of 2017. Construction was restricted to where and when Dunsire authorized work to occur. In November 2018, due to the delay in approving the variation orders, payments made in October to the 1st Claimant were reversed without the 2nd Claimant being notified. This caused a cash flow issue and loss of credit facilities with suppliers. Mr Williams said the 2nd Claimant made several complaints about all those matters and in response the Defendant advised that they were now tying the rate of production to the uptake in sales of housing units. In January 2019 the budget was again changed, and the 2nd Claimant was not privy to that either, although continually requesting the information.

[17] Mr. Williams highlights the progress report of February 2019 in which many of the above stated issues were raised, see exhibit 4 pages 354 and 383. He references a meeting in Canada on the 6th June 2019, which he attended, with Mr. David Morrison, Adrian Bennett and Graham Banks for the Defendant. At the end of his presentation to those gathered he was given a letter, dated 12th June 2019, which terminated the 2nd Claimant's services with effect on the 11th July 2019, see exhibit 5 page 440. On the 13th June 2019, at Mr. Shawn Keeper's request, he ordered all keys to the project delivered to Mr Shawn Keeper. He returned to Jamaica on the 14th June 2019. By letter dated 20th June 2019, exhibit 1 page 38, it was confirmed that blueprints, drawings, contracts, statutory approvals and other documents were handed over.

[18] On the 19th June 2019 a joint site assessment of the project was done involving a walk-through, detailed notes and photographs. A spreadsheet was created see exhibit 5 page 449. It was sent to Mr. Shawn Keeper of Dunsire on the 27th June 2019, see exhibit 5 page 447. Mr Shawn Keeper advised that the deferred payment had no time line for settlement. This deferred payment was the only outstanding issue with the 2nd Claimant. On the 19th of August 2019 exhibit 1 page 85, Mr. Shawn Keeper stated that funds related to invoice Number 30 and 31 were held in

trust until items (i) to (iii) requested in his email were received. The email also alleged that the deferred payment was not due as no units had closed at the project. Mr. Williams says that on the 9th September 2019 he provided Messrs. Shawn Keeper and David Norman with the information requested and told them that other documents could be collected on a flash drive at the 2nd Claimant's office, see exhibit 1 pages 44, 47 and 49. The flash drive was eventually collected on the 18th of September 2019. This notwithstanding the Defendant failed to pay items #30, US$15,000, #31 US$18,096.77 or #32 US$334,360.24.

[19] By letter dated 23rd October 2019, exhibit 1 page 51, the 2nd Claimant's attorney endeavoured to initiate arbitration proceedings pursuant to clause 706 but the Defendant did not respond. Legal action was therefore commenced in suit SU2019CD00463. A consent order, before the Honourable Mr. Justice Laing (as he then was), was entered on the 23rd January 2020, for the appointment of arbitrators. Negotiations as to the relevant terms of reference for arbitration occurred. Although expanded terms of reference were agreed the Defendant never responded to the dates for arbitration suggested by the arbitrator, Dr. Wayne Reid. The 2nd Claimant filed this claim on the 27th of September 2020.

[20] Mr. Williams says that an assertion of negligence was first made in March 2020. He notes that the termination on the 12th June 2019 was pursuant to clause 7.05 being without cause. Further, although the 2nd Claimant's contractual obligation was to ensure the schedule was in accordance with the business plan, it was denied access to information related to that business plan after January 2018 when the Defendant recast the budget. After the Defendant instructed that construction was to be *'phased'* the schedule became *'baseless*'. Prior to that the contract schedule contemplated continuous construction to the end. The instruction that construction was predicated on sale of units meant that the 2nd Claimant was unable to develop a new schedule. Mr Williams asserts that while the 2nd Claimant was project manager units were constructed in a good and workmanlike manner.

He gave a detailed response to the Defendant's counterclaim at paragraphs 79 to 92 of his witness statement.

[21] In amplification Mr Williams admitted giving a stop order in June 7, 2017. He explained the reason -

"Q: Were there, tell us why the stop order was given

A: yes, I can, lots 86-111 were slated for two storey units as in two levels. These designs were for the Victoria unit which were as yet not completed

Q: The design not completed up to the time you give stop order

A: Correct"

[22] He explained that the designs became available in July 2017. However, work did not then recommence as the costing submitted to the Defendant was not approved. The costing was done by the Quantity Surveyors CPM Consulting, this was Mr Sheldon Hay's company. Eventually the Defendant decided not to build the Victoria units. The witness explains there were two stop orders given. The second related to units 86 to 111 and the rest of the development.

[23] As it related to the finishing schedule the witness explained:

"Q: Finishing schedule in October 2017 is it normal

A: no it is not

Q: Is it not, it is normal for finishing schedule to come so long after commencement of project

A: no it is not

Q: why should it come earlier

A: to facilitate planning and procurement of large quantities of material finishing schedule is normally issued at the signing of the contract

Q: what contract

A: the contractor or builder's contract

Q: Were there any problems caused by lateness of finishing schedule

A: yes

Q: List what you consider to be the problems caused

A: model units would not be able to be completed in alignment with initial projections based on schedules

Q: how many model units

A: two

Q: explain how finishing schedule affected the model units readiness

A: what color they are to be painted in part of schedule, type of cabinets, bathroom varieties, kitchen cupboards, countertops

Q: all except countertop cabinets

A: yes

Q: What other items make up finishes

A: sanitary fixtures, like faucets, toilets, sinks, lighting fixtures, like ceiling lights, scone lights … lights

Q: Hardware,

A: Hardware also part of finishes, doors, hinges, door locks, blank locks on bedrooms (spaces you don't want to overly secured), mouldings trim tiles"

[24] As to variations, Mr Williams said there had been about thirty-seven of them –

"Q: Can you identify the main variations, top 10 in terms of delay

A: infrastructure redesign, clubhouse, retaining walls, owner supplied materials, lot grading, electrical infrastructure. In fixtures such as pendant lights changed to fan light combinations.

Q: To pool

A: *Part of clubhouse variations. There was a 2nd clubhouse variation (clubhouse #2).*

Q: *What was infrastructure redesign*

A: *The levels of the site were initially done from aerial survey. Upon our investigation, prior to signing our contract, we advised Edgehill Homes and Morrison's Financial that information was got from a Commissioned Land Surveyor (Mr. Allen)*

Q: *was he surveyor on the project*

A: *One of the surveyors*

Q: *When you started was he the surveyor on the project*

A: *Yes he was*

….

…

Q: *Continue your answer*

A: *Llewellyn Allen told us he could not provide us with details we required as he had not done the road projections among other elements of the initial survey*

….

…

Q: *Were you able to resolve the level problems that you had*

A: *Yes eventually*

Q: *How*

A: *When we were instructed to have Mr Allen do an actual survey*

…..

Q: *Time, any indication how long this influence problem from seeking to finally settling redesign and costing*

A: *8 or 9 months*

Q: *How did it affect the timing of overall project.*

A: Negatively impacted timeline. Can't say exact timing would hazard a guess.

Q: Your best estimate

A: Between 7 to 9 months of delay to the project."

[25] On the question of phased construction, the contractual terms were brought to the attention of the witness who mentioned that the development was originally not to be phased:

"Q: Having received contractors schedule give us your explanation as to what it means

A: Yes, the FIDIC Form of contract requires that contractor prepares and submits … for acceptance his plan of how he will execute the works.

The contract requires phased delivery. The schedule on page 38 and the columns for that right of schedule is "predecessors." That column shows how the tasks are linked, for example in line three two SS plus days translates to task 2 being linked to tasks one requiring an additional 5 days. Start to start "SS." Based on the schedule there would be tasked linked to what is presented as phases. Showing other things being done even as a phase is completed. Also in the body of this progress report this interaction of contractors schedule was not accepted as final because we found errors.

Q: Who is we

A: Project management office led by myself."

[26] The witness explained the alleged non-budgeting for form work. He was also asked about documentation and reports it was alleged had not been handed over. These included compaction tests and concrete strength test results. These he said were

on a flash drive delivered to Mr Paul Samuels. Mr. Williams was first cross examined by counsel for the 1st Claimant. He explained that in the contract the project manager is referred to as an engineer. The cross examination served merely to underscore evidence given elsewhere.

[27] Cross examination by the Defendant's attorney was detailed but did not significantly impact the credibility of this witness. Mr Williams agreed that the topographical survey was important:

"Q: How important would a topographical survey have been to the development.

A: Critical

Q: Did you say the absence of survey was one main reason for the delay

A No

Objection: my friend falsely states the evidence

Judge: it is a question

A: it would be a significant reason

J: Is it main reason

A: no

Q: is it main reason

A: I am not in position to say based on other factors

Q: if I were to quantify it if I say 80% responsible for the delay

A: in the interest of case a topographical survey was provided so I can't form an opinion as to impact of it not being provided

Q: so when you said significant

A: I say on any project it would be significant. In this project there was a topographical survey

Q: so when was it provided

A: At onset topographical survey an aerial one was provided.

Q: Are there different types

A: yes aerial as opposed to a ground survey

Q: it is your evidence that a ground survey was not provided

A: correct

Q: absence of the topographical ground survey was a significant cause of delay

A: yes

Q: what percentage of delay it caused

A: not able to say"

[28] The witness was challenged about his first report exhibit 1 page 3 and the opinion that the project would take 24 to 36 months:

"Q: Wouldn't it have been prudent before giving that opinion to have had that report before giving this opinion

A: yes with the explanation

Q: what is explanation

A: we asked client about the validity of the topographic survey but client insisted that it was ground survey. We took further steps of contacting the alleged surveyor in August 2016 who advised that it was not a ground survey.

Q: So when the report was done you did not have a ground topographical survey.

A: correct

Q: You also knew what you had was not a topographical ground survey.

A: No we did not know how."

[29] He was challenged on whether, after getting the topographical ground survey, he advised the Defendant that the timeline for completion would change

> *"Q: Did you communicate to Defendant 24 months no longer feasible.*
>
> *A: Not in those words. In April 2017 we reported in writing that an assessment by the civil engineer and redesign is required. Until this occurred I could not be definitive in terms of the time impact"*

The witness was asked to indicate where and when he told Defendant time for completion would be affected. The witness referenced his report of July, exhibit 3 page 257. He referenced pages 260, 269, and 282

[30] The witness disagreed that the obligation was to deliver '*habitable'* units. He opined that when the 2nd Claimant's contract was terminated 80% of work on phase 1 was completed. The witness explained that although there was no performance bond in the contract with 1st Claimant it was compensated for by doubling the retention from 5% to 10%. He was taken through details of the various reports.

[31] Upon completion of Mr. Paul Williams' evidence the 1st Claimant resumed their case. Dr. Wayne Reid, an engineer, was the next witness. His expert report of the 14th April 2023 was put in evidence as exhibit 7. In that report he opines that it was not possible to accurately determine the quality and quantity of work done by the 1st Claimant. Similarly, it was not reasonable at this stage to differentiate incomplete and defective works. He expressed an opinion on the steps to terminate a contractor. He answered a question about the normal process for termination under those contracts. He was asked about the normal process for measurement and inspection where a contractor's contract was terminated. In this regard the report exhibit 7 page 14 said –

"If certification was being done accurately during the contract period there would only be acceptance of work done in accordance with the contract specifications. Hence, any defective or incorrect work would not have been paid and the final exercise would not be tedious. If, however the interim certification had not been accurate and in accordance with the contract, the evaluation of termination or normal contract completion could be tedious."

The report also advised the standard procedure for addressing incomplete or defective work among other things.

[32] He was then cross-examined briefly by King's Counsel for the 2nd Claimant. Cross examination by Mr Gordon, for the Defendant, followed. This was detailed and wide ranging. This witness stated there was a big difference between retention money and performance security:

"Q: Tell us

A: Retention money is in first instance defined in the contract document. It gives them quantum of money in relation to the work that has been done and gives maximum amount of money that can be so retained. The performance bond, the employer seeking tenders may require bidder to submit a bond from a reputable third party to guarantee performance in the contract. It should not be mistaken for a financial guarantee. The performance bond lasts for the entire period of the contract from beginning to end even if the end is way beyond what was contemplated in the first instance. So you might have a contract which started as oneyear duration and for whatever reason ends up as two years the bond remains in force until the works are completed and that includes the defects liability period.

The financial guarantee aims at giving the same assurance to the employer but it has a time limit which is usually the usual contract period. At the expiration of that time limit that financial guarantee becomes null and void. Both the performance by the financial guarantee are instruments from a third party which under certain circumstances pay over the full amount of the instrument to the employer."

There was no reexamination of the witness.

[33] The 1st Claimant's next witness was Mr Delbert Williams a consultant quantity surveyor. His report and the cover letter were put in evidence as exhibit 8. The 2nd Claimant did not cross-examine him. The Defendant's counsel did. The witness was shown the report of Robert Blankson (marked B for identity but later became exhibit 11 (c)). It is dated 9th June 2022 and contains a compilation of defects. Exhibit 5 page 463 is a site inspection report done by FSC Consultants in July 2019. Mr. Williams was asked to examine both documents-

"Q: Having looked at page 463 to 472 is there anything in your report which would change

A: no"

[34] After re-examination the 1st Claimant closed its case. The 2nd Claimant called Mr. Shardon Haye a Chartered Quantity Surveyor who was the quantity surveyor on the project. He was engaged in the year 2016. The site became active in the first quarter of 2017. Mr. Haye was asked when he expected the 24 months' contract period to end and he said '*March or April of 2019'*. He explained that his role in the project was to prepare the budget based on the bill of quantities which his office also prepared. He was also to review contractor's rates and arrive at an agreed contract sum. Thereafter, he would prepare the building contract using "*FIDIC (1990), red book standard form of contract*". He also had post contract duties summarized as cost control. He, in this regard, did the monthly valuations and

assessed the progress of the works in order to recommend payment to the contractor. Any proposed changes to the scope of work would be assessed as well as the cost impact. All this would form part of monthly reports. The monthly recommendations for payment were sent to the project manager who would approve and send to the employer.

[35] The witness was asked about the termination of the 2nd Claimant as project manager and indicated he was surprised by it. He was asked about what occurred-

"Q: Can you tell us what process was involved in this case.

A: We concluded an assessment of the works.

Q: who is we

A: My company, CPM, Consultants are quantity surveyors, but this was done with the new project manager. We were restricted.

Q: Who was new project manager.

A: Shawn Keeper of Dunsire.

Q: Restrictions

A: We were restricted in our communication with Complete Development Solutions and that all communication should be through Shawn Keeper's office."

The witness indicated that the usual consultation did not occur after the 2nd Claimant's contract was terminated. The 2nd Claimant was not represented when his staff visited the site. This, notwithstanding his request to have the 2nd Claimant present. The request was denied by Mr. Shawn Keeper.

[36] The witness indicated that his staff took photos at the time of the inspection. He indicated there had been over 30 variations to the project and admitted that a new topographical report was requested:

"Q: Why was it required

A: Concerns noted by project management team and contractor when we started clearing the lands, and it was apparent that original topographical did not reflect reality on ground. Land was sloped differently than the original topographical showed.

Q: Sloped, how that affect

A: The contours are really the graphical representation of the shape. Topo may report contours immediately apart show a gentle slope when in reality actual slope is much sharper. So these contours would in actuality be much closer to each other."

Mr. Haye admitted that a new survey was done and that as a consequence infrastructure design was redone. It increased the budget for infrastructure and cost of houses. As some lots were much steeper there had to be additional basements and more expensive foundations.

[37] The witness confirmed issues with finishes-

"Q: issues with finishes

A: Yes, I recall, final determination for material selected rested with employer representative. Not unusual since employer wants to make sure final product marketable and what they want as an outcome. However, instances where final selection took longer than expected. Employers, representatives who take longer than Contractors schedules allow for the finishes required. However, I believe the most significant issue regarding finishes related to the employer's decision to import all finishes from China and timing of that.

Decision impacted the contractor's schedule for several reasons. Most notable being the contractor

would have already begun to procure materials that were selected in bulk orders and these orders would have to be rescinded to be replaced by Chinese bought materials. The impact on the contractor's supply chain given the lead times involved in ordinary construction materials meant the schedule would be impacted by the gap between the previous order now rescinded and the arrival of the Chinese bought material which would have been unavailable given the decision to switch material supplied that is finishes."

[38] The witness deponed about causes of delay on the project and his answer coincided with the evidence of the other witnesses. He stopped working on the project around December 2019 or January 2020. The witness said it is his understanding at start of contract that all 300 units would be completed in two years. He said the stop order and decision to "*phase*" construction affected the contractor's ability to carry out the work according to the schedule.

[39] The 1st Claimant's counsel cross examined Mr. Haye to good effect. He explained the process of considering work and making recommendations for payment. The witness was shown certificates of recommendation for payment, # 28 and 29 and identified his signature as approving payment, see exhibit 6 pages 4, 2, and 26. The witness indicated that Certificate # 30 was assessed, but Shawn Keeper was not in agreement.

[40] The Defendant's counsel embarked on a thorough cross examination of Mr Haye. The witness denied that phasing was mentioned in initial discussions. He agreed that practical completion means the building could be used as a dwelling place:

"Q: Means unit is connected to infrastructure, light sewage and water.

A: Three main elements. However practical completion can be granted with caveats wherein any outstanding items of work being non-critical can be listed on certificate as pending completion. So connection to infrastructure, you may be able to connect, but sewage can't be processed on site. In which case the switch would have to be removed periodically. In these instances, where incomplete works pending some arrangement may be made for alternate works, pending completion of outstanding items.

Q: Generally, three main things up and running when issue certificate of practical completion.

A: Yes, typically expected to have all infrastructure in place, however, in practice may be external factors outside the developer's control, such as JPS or NWC, connecting infrastructure, being in progress and so the scenario mentioned earlier may be put in place instead. Fairly common practice in industry."

[41] The witness was asked about topographical surveys and infrastructure and whether he could tell the difference. He said he could not say but knew ground survey, was more accurate.

"Q: At that time did project manager express view that two-year period no longer achievable.

A: Can't recall if that exact sentiment was expressed. However, once survey was completed and it was evident there was a vast difference between that and previous survey, it was clear project had to be redesigned, so it was evident time frame would move."

[42] Importantly, he denied knowing the budget at exhibit 1, page 19, but participated in the one at exhibit. 2 page 205. He explained:

> *"Q: The one you prepared is it exhibit 2 p. 205, is that one you played a part in preparing*
>
> *A: The entire document is the contract document my office put together. Page 205 refers to engineering services. It is only part we did not put together. It was Leighton Facey the mechanical and electrical engineer for the project. Page 204 says include provisional sum of $7,758. That number given to us by engineer and he gave us supporting documentation, thereafter. Wherever engineering services component arise these numbers generated by engineer. Includes both engineer services for units and electrical power and lighting for subdivision.*
>
> *Q: Would same principle apply when dealing with infrastructure work?*
>
> *A: Infrastructure measured directly by us. Everything else except mechanical and electrical services.*
>
> *Q: Finishes, this is last thing to go into unit.*
>
> *A: yes*
>
> *Q: Don't put finishes, is a superstructure?*
>
> *A: Superstructure is everything above ground. So finishes form part of it. Quantity surveyor says, superstructure. We classify finishes as what go on to structure."*

[43] Mr. Haye was shown Mr. Shawn Keeper's report of June 2019, exhibit 1 page 130. He gave detailed comments concerning its accuracy. In the course of doing so he revealed he had taken photographs at that time. Counsel requested sight of those photos. As regards the pool, the comments and, the 2nd photo at page 131 of exhibit 1, he said among other things, that it was '*impossible'* to build a pool that

fully overlooked the roof of the adjoining lot. He was asked about the problem with procuring finishes:

> *"A: can I ask to clarify; you mean if employer undertook procurement because contractor was having problems procuring them.*
>
> *Q: yes*
>
> *Q: My recollection it was related to budget. It was Shawn Keeper that proposed idea of procuring everything from China for less cost than what contractor could procure similar finishes for. So the contractor, had already bought material being used in finishes and roof. The proposal to bring material from China was based on the idea that all the material currently being used you can get an exact replica of it from China for less. So it would not affect the look of project, but could save money. I recall samples being taken from Nubian's stockpile, which were sent to China and supplier in China, asked to make a version of this. Which is what they did. And also, several of these replica materials were of lesser quality than originally being installed by Nubian.*
>
> *Q: You agree contractor had issues procuring material locally and that's why employer had to assist process.*
>
> *A: I recall request for advances for material but I don't recall procurement from China being based on*
>
> *availability or difficulties on main contractor's side."*

[44] The cross examination of Mr. Haye was paused after he referenced a report he had prepared and photos taken. I made the following orders/directions:

> *"The witness is to disclose-*

a. *All photographs relevant to the state of project as at June 2019.*

b. *All practical completion certificates about the project.*

c. *the report and recommendation that had been done, after 2nd Claimant was leaving, up to the end of May 2019.*

d. *His assessment as at September 30, 2019 if any."*

The trial was further part heard to 4th October 2023.

[45] On the 4th October 2023 the matter did not proceed but we resumed on the 30th May 2024. Mr. Haye produced photographs he took on June 4th and 6th 2019. All parties agreed to permit him to look at the photographs on his laptop even though they were not put in evidence. He was asked to compare his photos to those in exhibit 1 pages 131 to 170. The court rose to facilitate the witness doing so. When the trial resumed he said some photos and comments aligned whilst some did not. When re-examined the witness pointed to a number of photographs in the exhibit which did not align with his own. He went through those in detail. On the question of the absence of weepholes he pointed to the fact that those units had basements and therefore weepholes were not required. The witness also indicated some comments with which he disagreed. In particular at page 31 exhibit 1 about the pool deck:

"Q: You were stating. About the comment continue.

A: I disagree with first sentence page 131 lower photo. You can't make that determination from the photo and specifically the height of clubhouse, pool deck and adjoining lots was subject of an RFI (request for information) which is raised by a contractor when the design intent is not clear. I recall that RFI being

addressed and agreed with the architect and the employer. The levels were agreed as built."

[46] The witness stated that his photos showed the retaining walls with weepholes and correct bedding and back filling material on the pipes and trenches. As regards the comment on page 168 the witness said*, "My photo shows steel and mesh in roads and construction and I can give personal evidence, I saw it myself on my site visit."* This witness impressed me with his candour, clarity and expertise. The 2nd Claimant closed its case.

[47] The Defendant's counsel applied to put in evidence an expert report and recordings, without calling the witness for cross examination, and to recall Mr Williams for further cross examination. After hearing arguments, both applications were refused. The Defendant's first witness was Mr David Morrison, who described himself as a businessman, president of Morrison Financial Services Ltd. (hereinafter referred to as Morrison Financial) and president of the Defendant company. His witness statement dated 9th September, 2022 as amended stood as his evidence in chief.

[48] Mr. Morrison's evidence was that in or about, June 2016 the Defendant was looking for a contractor to complete 'The Gates of Edgehill' development. The 1st Claimant was selected. His company Morrison Financial financed the project exclusively. That company was also a minority partner in the Defendant. The 2nd Claimant was first retained to advise whether Morrison Financial should continue financing the project. In June and July 2016, the 2nd Claimant did site visits. He said they were paid US $50,000 to do the inspection and assessment. Their assessment and budget report was dated 1st August 2016 and reported that the project was feasible and could be completed within 24 to 36 months, see exhibit 1 page 1. Mr. Paul Williams of the 2nd Claimant shrugged off doubts about the time frame, expressed by Mr Morrison, and further represented that houses would be delivered to purchasers over the 2-year period hence the project could be financed

by sales revenue. These representations encouraged the Defendant to go ahead with the project and Morrison Financial to continue to fund it.

[49] After negotiations, the 2nd Claimant was selected as project manager and a contract dated 11th October 2016 entered into, see exhibit 1 page 7. As the principals of the Defendant and Morrison Financial were in Canada heavy reliance was placed on the 2nd Claimant which was a fiduciary of the Defendant and Morrison Financial. The 2nd Claimant was responsible to see that the project remained on schedule and on budget and to ensure the quality of product and construction in good and workmanlike manner. The 2nd Claimant, says Mr Morrison, expressly committed to completing the project of 297 houses, a clubhouse and other amenities within a maximum of twenty-four months from execution of their contract.

[50] The 2nd Claimant and the Defendant signed off on the project budget on the 13th March 2017. It was appended to the contract. Remuneration for the 2nd Claimant was set out in clause 47 of the contract. It had two components, a regular monthly payment of US$51,000 to be paid each month until completion or to a maximum payment of US$1,244,000 (24 months) which ever was more. The 2nd component was a deferred payment. Upon final closing and delivery of homes the 2nd Claimant would receive US$3,000,099.00 dollars from the proceeds of sale. The deferred payment was to be an incentive to the 2nd Claimant for performance. Additionally, they earned additional amounts if came in under budget and lost if they were over budget. So if the project saved 10% or more of the budget, the 2nd Claimant would get a bonus of half of these savings on top of the deferred payments. If it went over budget by more than 10% half the overrun would be deducted from the deferred payment.

[51] Mr. Morrison said that the 2nd Claimant recommended the 1st Claimant as general contractor. They were therefore employed as such. It was decided to use the FIDIC standard form of contract and this was signed on the 13th March 2017. The 1st Claimant also represented that the project could be completed within 24 months.

At paragraph 24 of his witness statement he said initially there was no controversy in the project. However, there were significant omissions from the budget as the forms used to form structures were omitted from the budget and this amounted to US $100,000. More financing was required and *'not one home was even near completion for delivery to a purchaser.'* On Sunday, October 22, 2017 he traveled to Jamaica and visited the project site. As at that date more than 250 of the 294 proposed units had not even been started. He says a fundamental error was committed as the concrete shells of houses was poured before completing servicing infrastructure. Upon his return to Canada he engaged Dunsire Developments Inc. (referred to in this Judgment as Dunsire) to assist with the project. Mr. Shawn Keeper was the responsible person there.

[52] Mr. Morrison says the project continued to be dogged by delay. In October 2018 when it was to be completed it was still far from completion. In correspondence, exhibit 5 page 400, the 1st Claimant said it could complete phase one by 30th June 2019 if the funds were advanced to purchase material. However, on the 30th June, the phase 1 houses were incomplete. Due to dissatisfaction with their performance a letter dated 12th June 2019 was delivered terminating the 2nd Claimants contract, exhibit 5 page 440. Dunsire thereafter replaced the 2nd Claimant as project manager.

[53] In paragraph 30, of his witness statement, Mr. Morrison lists several reports and documents the 2nd Claimant failed to hand over after being terminated. This is the explanation proffered for not paying the 2nd Claimant's final invoice along with several defects discovered, the cost of which eliminated the invoices. As to the claim of US$334,360.24 for deferred payments Mr. Morrison said the invoice was never certified and at the time, no homes had been sold, so it did not arise. Further, it was not yet determined if the project was under or over budget and therefore whether there was to be a deduction from the deferred payments. He says the walkthrough was done and it was determined phase one was 80% complete, which he now knows was inaccurate and it was only 70% complete. In paragraphs 36

and 37 Mr Morrison computes that the project in June 2019 was US$10,711,249.99 above the 2nd Claimant's budget. Hence, they would not be entitled to any deferred payment. He referenced a report by the 2nd Claimant dated June 2019, and concludes that even on their figures, the deferred payment would be eliminated.

[54] Mr. Morrison said the contract with the 1st Claimant was not continued as Dunsire identified several defects in their work. Further the 1st Claimant was having cash flow difficulties. In one case failing to remit payment to electrical subcontractors, in another failure to pay over the full amount of insurance premiums, see paragraph 43 of his witness statement. Although granted an extension, to 30th September 2019, to complete phase one the 1st Claimant failed to do so. Their services were therefore terminated pursuant to clause 15.2 of the contract.

[55] At paragraph 48 of his witness statement, Mr Morrison responds in detail to allegations in the statements of case as to the reasons for the 1st Claimant's delay in completion. He said that the late determination of finishing schedule was due to the 2nd Claimant's late submission of pricing and change of suppliers. However, the infrastructure was to be completed before finishing. As to floor tiles, it was the Claimant's responsibility to source these. The rock foundations meant the infrastructure had to be redesigned, he said the Claimants knew they only had an aerial survey and failed to obtain a topographical ground survey. The stop orders of June 2017 and March 2018 were necessary to ensure works completed in an organized manner. The finishing schedule was obtained in October 2017. Regarding material difficult to source, in particular doors which had to be modified, this, he said, was the Claimant's responsibility. Owner supplied finishes, this was done because the Claimants could not obtain due to poor relations with suppliers. Owner supplied material from China arrived in January 2019 and the Claimants were given permission to source items locally. In any event the finishes did not prevent completion of general infrastructure. Owner supplied sanitary ware resulting in major adjustment, he said that the Claimants failed to install them

following instructions. Front door handles not supplied, he said this was the responsibility of the Claimant. No hinges arrived and the replacement was thicker than original, he said hinges were always available. No towel bars or holders, he said these were always available. Revised pool detail not received, this he said, was only required because of 1st Claimant's negligent construction of pool house. Revised foundation detail for light poles never received, this was requested at the eleventh hour. Revised storm water drawings significantly different, he said that the Claimants failed to place required pipes below surface and the storm water details were supplied. Lift station generator room drawing September 2019, these were, he said, provided but did not prevent completion of infrastructure. South and north boundary wall details added in September 2019, they were improperly constructed resulting in the need to demolish. Solar water heater location, they were improperly installed by 1st Claimant and did not prevent infrastructure works.

[56] Mr. David Morrison denied the claim that Certificate #28 was not paid. He said it was settled after a set off and referenced an email trail in support. Certificate #29 he says was never certified for payment. After the termination of the contract, the 1st Claimant refused entry to the project site to the Defendant which incurred legal fees of US$18,348.95 to gain access. Mr. Morrison asserts that reports were done which revealed shoddy work and these he listed in paragraph 56 of his witness statement (a) to (cc), remedial work had to be taken in consequence. He said other defects were unearthed such as a failure to connect pipes, unaligned pipes resulting in water loss, failure to construct clubhouse roof in accordance with specifications and, houses and roads built at wrong elevation. The Defendant also suffered loss due to marketing expense increases. Also interest payments by the Defendant ballooned due to the delays. Total interest increase was US$20,241,452.75.

[57] He was permitted to amplify his evidence in chief and explained the business of Morrison Financial and its track record with financing developments. In 1996 Angels Estate was one of their projects. Mr. Morrison explained how they were

introduced to the development in Mango Walk, Valley Road. He identified the document at page 19 of exhibit 1 as the budget for the project prepared by the 2nd Claimant. It was appended to the contract. He denied that the budget was adjusted and of there ever being a request for it to be adjusted. The witness denied that any homes were practically completed at the time the 1st Claimant's contract was terminated. He said a house had to be habitable and capable of being handed over to a purchaser.

[58] Mr. Morrison denied that the issue with finishes caused any delay, because these were items needed only for the last 2 or 3 weeks of construction. He said there were huge supplier problems but this was due to the 1st Defendant's cash flow issues. He said this was the reason for the change to Chinese suppliers. The witness said within 6 months of the start of the contract, October 2017, he became concerned about delays and used the opportunity of his wife's birthday, and a visit to Swept Away in Negril, to visit the project. What he saw made him truly disappointed.

[59] On the matter of the redesign of the project –

> *"A: What was testified to is that the budget and plans had advanced on basis of an aerial topographic survey not a ground topographic survey. A ground survey was necessary and this was known by CDSL and Nubian in March 2017. It was not told Edgehill in December. The delay was because infrastructure could not be built based on aerial survey. They had to commission ground survey and amend the infrastructure design accordingly."*

When pressed further he said,

> *"Q: I was not privy to issue of aerial survey and ground survey. In negotiation of budget I assumed CDSL was looking at whether it needed to establish proper budget and proper timeline."*

With regard to the payment delays alleged he said it was a problem with Nubian cash flow issues. As regards Dunsire he said they did not show up until 2018. He was asked about documents and gave a response that was so incomprehensible I quote it in full:

> *"Q: You recall documents CDSL had on flash drive and whether they were handed to Edgehill in 2019 after CDSL parted ways.*
>
> *A: At the time we terminated Nubian 1 and CDSL there was supposed to be a walkabout where you tour the site and identify and document deficiencies and status of the site at that moment in time. We started the process and Edgehill found that a large proportion of the work done by Nubian under supervision of CDSL was not visible to the naked eye was underground and embedded in concrete. We could not sign off on an agreed project status without knowing status of latent work. As part of effort to address issue we requested various test results and certificates to be able to say work not visible had been properly done.*
>
> *The results were not available I do not know why. Don't know if tests were ever done, but we could not get them."*

[60] Mr. Morrison also denied any responsibility to pay salaries. He was unaware the 1st Claimant had had to take out a loan, he did not know about motor vehicles or the Vermeer equipment or mobilization sums. The witness also stated that there was a 3-year delay in obtaining titles because of deficiencies in the development and a large number of houses not built in accordance with approved drawings and site plan. Also the hot and cold water taps were in reverse order. In the roofs of houses Nubian had not installed impervious membranes. Also concrete, not

asphalt, roads were installed. They paved it with asphalt so he was concerned municipal corporation would not approve.

[61] When shown p179 of exhibit 1 the witness indicated Jamaican interest rates were used. When shown the contract exhibit 2 page 30 he said he did not sign it. He says Mr. Williams of the 2nd Claimant went to great lengths to say the 1st Claimant did not have to be bonded they would be protected by "*hold back*" alone. He said he recorded the telephone call. Over the objection of counsel, I admitted the recording of the conversation as exhibit 9. Having listened to the recording I found it unhelpful in the resolution of the issues before me.

[62] The 2nd Claimant's counsel was the first to cross-examine Mr. Morrison. The witness admitted that the Defendant had no office in Jamaica. His correspondence was issued from the offices of Morrison Financial in Canada. Mr. Morrison became president of the Defendant in 2015. Mr. Morrison admitted that prior to going into finance he qualified as a lawyer. He was referred to page 67 of exhibit 4 and referred to areas of significant cost changes. He admitted he had seen those words.

> *"Q: Do you agree this engagement was about fact that price of project would have to be increased?*
>
> *A: Yes"*

He was also referred to page 85 of exhibit 4 and asked whether Dunsire ever circulated the final budget referred to therein. His response was there had never been a final budget as the project was still ongoing. When pressed he retracted and admitted that project ongoing does not mean there could not be a document described as a final budget.

> *"Q: I am asking whether the final budget contemplated here was ever circulated by Dunsire.*
>
> *A: I don't know"*

[63] Mr. Morrison stated that, after the termination of 1st and 2nd Claimant's contract, Dunsire's engagement ended in March 2022. He, thereafter, took over the development and retained a Mr. Raymond A. Johnson. He was asked about the retention of the 2nd Claimant:

"Q: When engagement with Paul Williams from CDSL started I mean you really wanted him to do was use approval, plans, report you already have to give you a budget as to what would take this matter to fruition.

A: Yes.

Q: Paragraph 5 of your witness statement. The material you expected him to use were plans and stuff you had given to him?

A: No.

……..

"Q: EHL paid CDSL US$50,000 to investigate and assess. Provide me with correspondence stating what was agreed that CDSL should do for this US$50,000?

Objection: Wish witness outside.

Judge: wait outside

Objection: Answer is in CDSL own document Exhibit 1 page 1. That sets out what CDSL was required to do.

Q: My client's document can't answer for the witness

Judge: what is relevance

Q: The document my client prepared does not say we were paid US$50,000 for that

Judge: Very well proceed

[Witness recalled]

Q: Is there any document that exists to show an agreement as to the fee for task on investigation and assessment.

A: I can't remember

Q: I suggest there was no US$50,000 paid to CDSL or Paul Williams in relation to investigation and assessment by Edgehill or Morrison

A: If I recall it was to be received in his first payment under contract.

Q: We are talking about the investigation and assessment which you say is a pre-contract arrangement

A: Don't recall if paid or not"

[64] Mr. Morrison was challenged on his claim to US$2 million. He said it was US$500,000 spent on the project and the purchase price of the land. He had no documentation in support. He said he started financing the development of the project in 2014. As regards the claim for interest he admitted that interest charges prior to 2017 related to the earlier failed project and did not concern the Claimants. He also acquired the land long before any relationship with the Claimants. The witness admitted that in its first report the 2nd Claimant had opined that the purchase price paid for the land was excessive, see exhibit 1 page 4. As regards the topographical survey his answers in cross examination are worthy of note:

"Q: One of the biggest problems CDSL told you about was that the terrain was of a much different nature than what they had been lead to believe based on aerial survey they had been given.

A: They raised it but did not discuss the implication of it until December 2017, 9 months later.

Q: Email 25th October 2016 from Complete, Exhibit 1 page 20

A: Yes.

Q: 14 days after date of contract

A: Yes.

Q: Email read to you. Did you know L. Allen was surveyor of project?

A: We would have known.

[continue reading]

Q: Raised separately there was a problem

A: This is 5 months before he started.

Q: Comment

A: The document speaks for itself.

Q: "delaying … work. Were you involved with any ……. surrounding the matter of surveyor and these initial problems highlighted?

A: I don't recall.

……..

Q: Exhibit 1 page 21, #s 1-4 on that document, you knew CDSL said because of terrain there had to be infrastructural redesign

A: Asking me to say CDSL made us aware that through this document. I can't tell looking at this document who made it."

[65] As it relates to the stop order the witness said he was not aware one was issued by the Parish Council although shown exhibit 1 page 3. When shown progress reports at exhibit 3 pages 3 and 11 the witness said he could not recall if he had seen them:

"Q: Any reason why the Defendant has not called any of the people who were on that [project] team to give evidence about these matters. A: Guidance of our counsel."

The witness was also effectively cross-examined on the question when he became aware of the need to change infrastructure plans:

"Q: What it is they made you aware of in December 2017?

In December 2017 is when it was explained why the infrastructure was not started.

Q: Is there a document in which this information was communicated?

A: I would have to look through the exhibits to see if commented in writing or orally.

Q: If verbally who in your organization received it.

A: That point a member of the team or multiple or maybe Shawn Keeper of Dunsire.

Q: In December this would have been a significant revelation?

A: The received revelation that project not advanced as a result of visit in October 2017. I learned why in December 2017.

Q: Exhibit 3 pages 36 and page 15 that is monthly report for April 2017?

A: Yes.

Q: Page 36 "redesign infrastructure works" clear information provided to the Defendant that redesign work was required and engineers instructed to commence it?

A: Yes."

[66] Also effective was the challenge to the time period for interest calculations. The witness was not aware that a stop order was issued by the Parish Council prior to contract and was only lifted in March 2017. He admitted the stop notice had nothing to do with the 1st or 2nd Claimants, and hence interest charges should not run during period of stop notice:

"Q: Based on how your team operates it would not surprise you if team was unaware there had been a stop notice on your project.

A: It would not surprise me"

[67] On the question of Dunsire's role and when retained the witness admitted that in or about August 2017, although not under contract, Dunsire was *"initially engaged provisionally to review what was going on and advise."* He admitted that he received a brief from Dunsire before coming to Jamaica in October 2017. He was shown his witness statement, and exhibit 3 pages 514,590 and 600, but denied Dunsire was leading the project team:

"Q: If CDSL was under the impression that Dunsire had authority to make types of decisions that CDSL thought they could make would cause confusion in project for which CDSL was project manager.

A: No don't think so.

Q: You said CDSL your fiduciary and in case of conflict your instruction paramount?

A: Yes.

Q: If reports shown that they have a misconception as to who is boss in these decisions then Edgehill should properly correct it?

A: Not really. It had no implications.

Q: Had you seen any communication out of Edgehill or Morrison Financial which attempted to correct this erroneous notion CDSL had.

A: I did not know they had misconception.

Judge: Please answer the question.

A: No, saw no such communication"

[68] Mr. Morrison was also effectively challenged on his denial that any certificates of practical completion were ever issued:

"Q: Exhibit 6 pages 32-69 [read] is it you never saw this before?

A: I have never seen them before.
Judge: Before today?

A: I have never seen them before today.

Q: Did you see them before commencement of this trial?

A: No."

Similarly, on the question of a walkthrough after the 2nd Claimant's contract was terminated, the witness was unimpressive:

"Q: Whose responsibility for Edgehill to ensure there was accurate recording of state of project with CDSL leaving?
A: Dunsire would have been.
Q: Tell me why Dunsire has not been asked to produce photos of state of project on date of walkthrough.

A: No, your question assumes they have not and I don't know.

Q: It was important to know state of works when Nubian and CDSL left?

A: Yes.

Q: Much of your complaint is that a number of things they ought to have done which they had not done?

A: Yes.

Q: Tell me who in your team is responsible to ensure a proper record of what happened on …

A: Dunsire and his team.

Q: When Dunsire did what they do?

A: Give it to us. Dunsire says a definitive report could not be done."

[69] On the question of alleged outstanding documents, the witness was again effectively cross-examined. It was demonstrated that either documents were

delivered, not in 2nd Claimant's purview or, that the project was not at the stage when several documents could have been available:

> *"Q: Paragraph 30* [of your witness statement] *you say if not provided they would not be paid, I am asking you to tell me any stipulation that this was to be provided.*
>
> *A: It happened in the walkthrough and the process. We trying to establish condition of works not visible to the eye. To know state of infrastructure in parts not visible.*
>
> *Judge: That is rationalization but where is the document?*
>
> *A: I think to remember there were emails back and forth but I personally don't have those. But it was not a contractual requirement"*

[70] On the morning of the 16th May 2024, over the objection of Claimant's counsel, I granted the Defendant's application to amend and directed that the amended statement of case be filed by the 17th May 2024. The Claimants were, if so advised, permitted to file and serve an Amended Defence to Counter-claim on or before the 3rd June 2024.

[71] The cross-examination of Mr. Morrison continued and effectively demonstrated that in October 2016, when the 2nd Claimant raised the matter of the accuracy of the topographical survey, no money had yet been paid to either the 1st or 2nd Claimant and no contract signed with the 2nd Claimant:

> *"Q: At that time, you not yet deeply invested in the project under the new scenario.*
>
> *A: Correct.*
>
> *Q: Notwithstanding you decided to remain?*
>
> *A: Purpose of the exercise was to make that decision.*
>
> *Q: When you were told the issue in email of 25 October "resolve the issue" that did not cause you to pull out?*

A: No, because we hadn't seen the budget yet.

Q: But you were aware the budget would not take into account matters of design on 25th October?

A: We were not advised of that we expected it would take that into account.

Q: Do you know when the ground survey was completed?

A: I only learned in the testimony of the Claimant in this litigation.

Q: Who in your team would have known?

A: All of them.

Q: Because it would have been in the report?

A: Yes."

[72] On the 16th May 2024 at 10:50 am the Defendant's expert witness Mr. Robert Blankson, a quantity surveyor, was interposed. Mr. Morrison was asked to wait outside. Mr. Blankson's report was admitted as exhibit 11 (a) and (b). He was cross-examined by the 1st Claimant's counsel and admitted that he had not been to the site prior to October of 2021. He admitted an inability to say anything about its condition in September 2019. He was taken through the details of his report which valued the alleged defects. He said the defects were identified to him by the engineer Mr. Burgess and Mr. Omar Woobine of CEAC who was the project manager. He was effectively cross-examined to demonstrate that many of the complaints were about incomplete and not defective works. Also, in some cases if given notice of repair the contractor may have corrected. An important question was asked to which there was no instant answer, that is, if the pipes had not been pressure tested why were they connected to the National Water Commission and that that caused the alleged excessive water bills due to leaks. Importantly the witness admitted he was not asked to cost the work the 1st Claimant had done.

Cross-examination by the 2nd Claimant's counsel was brief. It emerged that the witness had seen the original design drawings which had specified weepholes for certain walls. These were absent. There was no re-examination of the witness. In

answer to the court the witness admitted that passage of time will have affected the costing. Also, in answer to questions arising by counsel, he said the Covid-19 pandemic will have also had an impact.

[73] Mr. Christopher Burgess of CEAC was the Defendant's next expert witness. His report was admitted as exhibit 12 (a) and (b). He commenced his inspection of the project in October 2020. He said he reviewed the contractor's contract, and in his opinion, over 70% of the works had been completed. He stated that at the time he did his inspection two or three contractors were doing "*minor*" work on the site:

> *"Q: Explain "minor" works*
>
> *A: There were two or three contractors actively engaged on the site. First was a former NWC contractor involved in repairs to pipes. Developer had indicated enormous bills due to leakage, the second was "Chin" who was doing some works related to incomplete waste water treatment plant. Third was a Mr. Dunstan most involved doing electrical works. They have a unique electrical system mostly underground."*

The witness also said Shawn Keeper's report exhibit 1 page 130 is consistent with what he observed when he examined the site. He explained the short comings of an aerial survey. He was asked about the meaning of practical completion and responded:

> *"A: When work is substantially complete and can use works for what it is intended for. So in case of infrastructure access to water, sewage disposal system, safe and reliable passage of people on the roads. In relation to homes it would mean houses are habitable. I have heard of several definitions of habitable, but they all converge on a few factors.*
>
> *Q: What are these factors?*

A: Home is enclosed. Doors windows. Two, that you can live so running water and a toilet. These are common requirements. Practical completion does not mean work is free from defects. Means can be used and defects noted are expected to be repaired before the end of a defects period."

[74] Mrs Cummings for the 1st Claimant was the first to cross-examine Mr. Burgess. He admitted to her that he had been employed by the Defendant on the site between 2020 and 2022. He was employed, he said, to do two things. A condition assessment and to assist the developer to find contractors to finish the work. He was asked about incomplete as against defective work:

"Q: Is there a difference between defective work and incomplete work

A: Yes

Q: Look at page 24 of Exhibit 12 (your report). Is image at 4.10 incomplete or defective.

A: Both reason why, in the preparation of my report one picture to represent the particular wall but we would have had advantage of seeing it on site as well as numerous other photos. It appears to be missing weepholes and appears to have steel on top. Suggests more work to be done on top.

Q: Figure 4.9 the levels between lot 37 and 39 seem to be same level. Why need weepholes

A: I think there is a grade or a fill on the other side of the wall. Can see the house but need to refresh myself with topographical information".

On the question of whose instructions to follow:

"Q: In this contract there was an issue whereby architect drawing for clubhouse roof required "X" material and

engineer drawings said "Y" material. Contractor followed architect's drawing, is that wrong.

A: Wrong because the contractor must build something to stand up structural integrity is found in engineer's drawing

Q: Were you aware the architect was Zuar Ltd.?

A: That is my understanding because we saw drawings.

Q: When would architect's drawing trump engineer drawings.

A: If specified in the contractor's contract. But some contracts tell you which takes precedence over the other. I am not sure if that is the case. Nonetheless suits an experienced contractor to take engineer's drawing and B/Q and to seek clarification where there was divergence.

Q: Where would he seek clarification?

A: Representative of the employer.

Q: The Project Manager?

A: CDSL who would have hired the engineer FSC and Zuar to

Q: To resolve issue

A: Yes."

[75] Mr. Burgess says he spoke to the 1st Claimant before completing report but did not share its contents with them. He had not seen state of project in September 2019 except by photographs provided by Shawn Keeper and FCS. The cut-off between each contractor was however unclear to him. On the question of water bills and alleged defective work:

"Q: Do you know if pipeline test was done

A: I believe so. It was not something which happened immediately after we got there. There were substantial

repairs before we got there, which you could see reduction in water bills. We were encouraging Edgehill or Dunsire to conduct a more thorough water pressure test. Do not believe it was done. [Witness looks through report.] Section 6.4 at page 39 of my report the pipeline is retested.

Q: Water bill October 2019, November 2019, December 2019. So how long after a defective pipe could allow ballooning. Nine months after before it ballooned.

A: Not sure what billing arrangements are.

Q: Why until following year that bill would balloon?

A: Do not think that bill represents metred consumption. Don't know what arrangement with NWC was. Sometimes NWC bills bulk and sometimes they represent late pressure and supply based on occupancy. So if no one is occupying development they would close the value. If persons occupying they would open it."

With respect to the boundary walls:

"Q: Had Nubian completed, construction of boundary walls before they left September 2019

A: The walls were certainly not complete

Q: page 30, two broken manhole covers images 5.2 and 5.3. Could that be caused by the heavy duty equipment going over them.

A: amongst other things yes

Q: you can't tell whose fault

A: or what is at fault except that it is defective."

[76] With regard to the costing done by Mr Blankson the witness admitted he was not asked to cost incomplete works specifically. When shown exhibit 11 (a) page 22,

which describes wall as incomplete, the witness admitted an error as it should have said "*incomplete and defective":*

"Q: is it possible Mr. Blankson had costed other works not defective but only incomplete

A: I am really not certain."

[77] The cross examination of Mr. Morrison, by Kings Counsel, resumed on the 16th May, 2024 after interposition of the two experts. He was asked further questions about the meeting of 5th January. 2018 in Toronto:

"Q: Suggest to you as head honcho of both, it is meeting about review of the budget. Page 67 exhibit 4 reads, "revised budget….." This is after recognized aerial survey, topography was not reliable, and a ground survey was required.

A: It occurred after that, yes,

Q: L. Allen land surveyor had been commissioned to do ground survey and issue his report.

A: Not sure can't say it was not.

Q: By then, communication to your team that there had to be redesign of the infrastructure.

A: Yes,

Q: that redesign meant to your team that there would be an increased cost to the project,

A: not necessarily may have been less was never quantified".

The witness went on to admit that Norton Ari a quantity surveyor (called cost consultant) from Canada was also at that meeting and,

"Q: That meeting was for a budget presentation based on fact that things had changed.

A: I have no doubt that that was discussed at the meeting."

Mr Morrison's want of candour was apparent. The following exchange followed:

"Q: Even from January 2018 you did not see need to recast budget.

A: Not for purpose of the budget that is attached to the contract, because if you change the benchmark budget with every actual change in the operating budget, then the benchmark budget serves no purpose for measuring the success or failure.

Q: Suggest that it was recognized by Edgehill that, based on changed circumstances, the budget had to be recast and this became apparent, by March of 2017.

A: What budget?

Q: Project pro forma budget attached to agreement.

A: No.

Q: Put to you that Edgehill Team also recognized contract had to be extended because of the various issues.

A: No

Q: any correspondence that you can locate from your team in which you were expressing surprise or disappointment about the progress of the work

A: I would have to go back and look at everything

Q: Any reason why one member of your team more familiar with project did not give a witness statement

A: Took my counsel's advice

Q: Exhibit 3 page 591, 623, 625, 626 #14 (report of October 2017) need for budget to be recast. Edgehill and Morrison Financial deliberately refused to provide the new budget that had been promised so as to provide clarity to Claimants and other professionals and in particular 2nd Claimant.

A: It was never the job of EdgeHill and Morrison to deliver the budget. We never refused to do so. Never asked to do so. Never failed to do so."

[78] The witness was quizzed in detail about alleged changed instructions in the course of the project and about delayed decision making. This culminated in the following exchange:

"Q: Exhibit 3-page 59 (progress report October 2017). [Read]. *Your team directed Claimants to go in one direction and due to change to your sales policy, you put them on hold.*

A: Not the Claimants

Q: Also, that time, there were about four meetings involving CDSL, where CDSL engineering with different people, architects Dunsire and other persons on the team, where issue of clubhouse and two storey units was an ongoing item of discussion

A: yes

[bathroom break 11:55-12:15]

Q: Exhibit 3 page 593 4th paragraph (report Oct. 2017

[read] *Do you know what is lot number of these 20 units being earmarked for 2 storey.*

A: Don't know numbers, but know they were.

Q: Suggest lots 90 to 110.

A: Sounds correct

Q: You took six months approximately for Edgehilll to decide what to do with these 20 lots.

A: I can't say yes or no"

[79] Mr Morrison was also effectively cross examined on the assertion that there were sales lost due to the Claimant's delay:

"Q: Was there to be a model unit?

A: yes

Q: The finishes that would be so important to be displayed either in model unit or communicated otherwise, were not approved by you until September 2017.

J: Break it down.

Q: Finishes page 593 exhibit 3 [reads]. In marketing the optics of finishes is very important.

A: Yes.

Q: So you say contracts were signed for 33.

A: Yes, without looking at finishes.

Q: Were any of these contracts completed?

A: No.

……

Q: No documents you disclosed to show why these contracts not completed.

A: I can't speak to that."

[80] Cross examination of Mr Morrison by Mrs Cummings commenced on the 24th July 2024. In answer to her he indicated that, although qualified as an attorney, he had not practiced in 40 years. He had previously financed developments in Jamaica but was never prior to this a developer. He had no prior experience with FIDIC contracts in Jamaica. He did not know the amount paid for mobilization but denied it was $3,610,952.90. He could not say without reviewing the contract if it was the architect's responsibility to issue certificates of practical completion. He was not aware that once a certificate of practical completion is issued the contract allowed 365 days for a notice of defect, see exhibit 2 page 106. The following exchange:

"Q: Who was engineer on project?

A: I don't remember

Q: page 28. of exhibit 2 engineer was it CDSL.

A: No, it does not.

Q: Clause, 3.1 [reads] That does not suggest it is CDSL.

A: No

Q: page. 29 exhibit two. Paragraph 3.4 [reads] who were they referring to,

A: I don't know, we did not understand that to be professional engineers. We understood them to be a project management firm.

Q: suggest that Clause 3.4 speaks to procedure to replace CDSL

A: disagree

Q: Edge Hill failed to comply.

A: Disagree."

Later the witness said his memory was refreshed and that the engineer was FCS. Clause 1.1 .2 .4 at page 106 of exhibit 2 he described as an error.

[81] There then followed a telling exchange related to the 1st Claimant:

"Q: Page 50 Exhibit 2 clause 11.1 these are conditions you can advise of defects.

A: I agree it says what it says

Q: Clause 11.4, agree.

A: Yes.

Q: Did Edge Hill ever give Nubian any notice of defect prior to this case?

A: [pause] I believe so. Yes.

Q: When you gave notice

A: At time we terminated

Q: How orally or in writing.

A: I would have to review records. Certainly orally but would have to review records.

Probably in writing as well.

Q: Did you share these with counsel?

A: We gave our counsel all documents pertaining to the case.

Q: what time frame you gave Nubian to remedy defects

.A: We did not ask them to as defects come into category of 11.4 (c). So substantial that we agree terminate the contract

Q: So you did not follow the terms of the contract you agree

A: no.

Q: You told us you discovered new defaults in 2023 with mixer roofing.

A: And titles and survey.

Q: We heard nothing about that.

A: I believe I mentioned survey.

Q: So despite contract giving 365 days you are asking about deficits three years and eight months later.

A: No

Q: Three years and 8 months after Nubian left project.

A: Discovered survey breach in 2023, 3 years."

This extract in a nutshell summarizes a major issue before the court. It also reveals a somewhat cavalier attitude by the Defendant towards its contractual obligations.

[82] The exchanges, as regards unpaid certificates, were worthy of note with the witness insisting that Edgehill honoured its obligations. He appears to insist that certificates for August 2019 (page 4 of exhibit 6) were paid. He admitted that between July and September 2019 Dunsire was project manager. He said the termination of 1st Claimant's contract was handled by Dunsire. The witness was not directly involved in the termination. Dunsire he says was not called to give

evidence on the advice of counsel. There then follow another example of his disingenuity:

> *"Q: Exhibit 4 page 428, see there.*
>
> *A: This is an attempt by Paul Williams to shift blame for a major error that was committed much earlier.*
>
> *Q: Did you have any correspondence to Paul Williams taking issue with what he said here.*
>
> *A: Yes it is a termination letter*
>
> *Q: The report is March 2019 when was Paul Williams terminated*
>
> *A: Same time*
>
> *Q: it was June, do you have any*
>
> *A: It is in a letter, don't have it*
>
> *Q: Exhibit 5 page 440 terminated*
>
> *A: Yes June 12, 2019*
>
> *Q: Between March and June no document taking issue with Mr. Williams do you agree*
>
> *A: if there was we would have produced it."*

[83] The cross-examiner effectively demonstrated the difference between incomplete and defective work, with which Mr Morrison agreed. He struggled when asked to explain the absence of the 1st and 2nd Claimants from the walk through in September 2019. He said the quantities in certificates 28, 29 and 30 were not disputed. After some hesitation he said that Dunsire had done some work on houses, advanced work on sewage system and infrastructure and, built temporary sewage system for some 30 houses in 2019 after the 1st Claimant left. He was asked whether that information was in any document and answered in the negative. Interestingly the witness was also asked about mediation:

> *"Q: Did you ever go to mediation with Nubian*
>
> *A: No*
>
> *Q: Why*

A: We did not feel we had factual basis on which to do it."

[84] The poor credibility of this witness was further exposed by an interesting exchange,

"Q: Exhibit 6 pages 32-38, certificates of practical completion

A: No I believe these documents are fraudulent

Q: Do you know Mr. Orville Dixon's signature

A: Yes, I have authentic signatures that are different

Q: These documents signed and sealed

A: A poor impression of one

Q: See Orville Dixon

A: Yes

Q: You're suggesting it is all fraudulent.

A: I believe it to be.

Q: Do you know?

Mr. Graham: May I ask witness to be excused.

[witness outside] *These are agreed documents.*

J: That is witnesses' evidence goes to credit

[Witness returns]."

[85] The reexamination did not do much by way of rehabilitation. Mr. Morrison was asked among other things:

"Q: You said budget attached to the CDSL contract versus a project budget. Is it the same

A: No budget attached to the contract is benchmark budget intended to be the standard against which performance is measured for the purposes of the contract. The project budget is the actual financial performance of the contractor. In this case, they very

quickly diverged. The project budget was far in excess of the benchmark budget attached to the contract."

He was asked about practical completion:

"Q: During cross examination by Ms Cummings you were asked if you understood certificate of practical completion and you said building to purpose. What was purpose of these units?

Objection: Not seeing anything to clarify

J: Allow

A: The project consisted of building 311 single family homes with corresponding infrastructure and amenities within the gated community in order to be practically complete. Must be possible for an occupant to live normally within the home which includes the supply of electricity, water (potable) and sewage among other things."

He was asked about the mobilisation amounts and suspension of works. He clarified the reason he said Mr. Williams at page 428 exhibit 4 was attempting to shift blame:

"Q: you said this was attempt by Williams to shift blame for major error, what was major error

A: Building houses before infrastructure that is sewage, water, electricity on site to service these houses."

Importantly, an effort was made to lead evidence in rebuttal about titling issues and problems with a surveyor's ID report. Sustained objections were taken by both counsel as the issues had not been raised with or put to the Claimants' witnesses. After an exchange with the court, the parties had discussions. When court resumed the Defendant closed its case and a date was fixed for submissions to be made.

FINDING OF FACTS

[86] The findings of fact have not, on a balance of probabilities, been difficult to decipher. The Claimants' witnesses impressed me with their candour. Furthermore, their evidence quite often was supported by contemporaneous documents. Mr Morrison, the Defendant's sole lay witness, was on the other hand unfamiliar with details and appeared to say that which he thought most helped his case rather than that which he knew to be a fact. The Defendant's experts did not generally impress me primarily because most were giving evidence based on observations after the fact and after other contractors had been on the site.

[87] I find as a fact that the parties entered into separate contracts with the Defendant. The 1st Claimant's is dated 13th March 2017 and the 2nd Claimant's 11th October 2016. Prior to entry into that contract the 2nd Claimant had done an appraisal report exhibit 1 page 1 utilizing the Defendant's records and reports. Among which was a topographical survey. I accept that the 2nd Claimant was not made aware by the Defendant that it was an aerial survey but it was the 2nd Claimant's enquiry of Mr Llewlyn Allen which brought this to light. The 2nd Claimant informed the Defendant that there were issues with the topographical survey as early as October 2016, see exhibit 1 page 20. I find as a fact that this was sufficient to make the Defendant aware that cost and time implications were likely to arise. It must have been obvious to all concerned that, depending on the soil conditions and slope of terrain, the design and work plan might be impacted. It was clear that the scope of the project might be impacted in a major way. After the ground topographical survey was done, and the rock foundation and slope of terrain revealed, all parties knew and agreed that a new infrastructure design and hence a recast budget for the project in time and money was necessary. This became apparent before the contract with the 1st Defendant was signed, see exhibit 1 pages 21 and 34. These findings are supported by the evidence of the Claimant's witnesses, which I accept, but also in large measure by the several monthly reports issued by the 2nd Claimant see for example the May 2017 report exhibit 3 page 93. The 2nd Claimant

repeatedly asked about the new designs and costings.

[88] I find also as a fact that other delays on the project related to late or no decisions on the finishing and the new design. The many changes, 37 in all, see the evidence of Mr. Paul Williams, also contributed to the delay. The late delivery of finishing is directly correlated with the instruction that Dunsire source these in China. I reject the assertion that the decision so to do was connected to any financial issues with the 1st Claimant. Rather it is more probable, and I so find, as the 1st Claimant's witnesses said, that issues arose due to the cancellation of orders previously made. It is apparent that in their zeal to cut costs Dunsire, the Defendant's representative, adopted unsavoury methods such as asking Chinese suppliers to copy products and produce them at lower cost. This was to get a similar appearance at lower cost. It is apparent that there was no contemporaneous challenge to the certificates of practical completion issued and certified. Mr Morrison's assertion of forgery appears to be an act of desperation. The insertion of Dunsire into the project appears to have had a destabilizing effect, as did the late approval of the infrastructural design. The failure to involve the 2nd Defendant in the recast budget and the change to phased construction, involving a sell as you build approach, all impacted the work schedule and the Claimants' ability to plan the work and meet deadlines. The late or non-delivery of finishes had a similar impact as did the delay in critical decision making. The certificates I find were duly signed and approved and are not, contrary to the evidence of Mr. Morrison, fraudulent.

[89] The termination procedure was abrupt and without the appropriate formalities. In the case of the 2nd Claimant the letter dated 12th June 2019 was delivered on the 6th June 2019. Although it spoke to termination on the 11th July 2019, the 2nd Defendant was asked to and did hand over all keys on the 13th June 2019. That was the date of termination. As regards the 1st Claimant the termination was oral, and immediate, on the 30th September 2019. The Defendant and its agents displayed a shocking disregard of its contractual obligations. I find that the

construction was in order and the project in terms of its recast targets was 80% completed. I reject the notion that "*practical completion*" meant that units were ready for occupation with all utilities connected. This could not be so because the contract did not so state. Neither did the contract require electricity, sewage, water connection prior to certification of houses. That would be absurd. The light and power company and the water commission could require houses to be inspected or delay connection having to do with their own internal processes which have nothing to do with the contractor's quality of work.

[90] It is also unfair for the Defendant to blame the Claimants for loss of water when, as I find, it connected the pipes to the National Water Commission before first doing a pressure test on the system. The Defendant wrongly terminated the contracts, before the Claimants had completed the works, and failed to give notice of the alleged or any defective work within the 365 day period allowed or at all. The Claimants did not tell the Defendant that the pipelines to convey water had been pressure tested and ready to connect. Any alleged bills they incurred for loss of water are for the Defendant's account. There is no documentary proof of lost sales due to defects in the work done by the Claimants and as such no award in that regard. There is similarly no entitlement to interest as the delay on the project was not due to the Claimants' fault. With respect to the roof of the pool house the 1st Claimant I find acted reasonably when relying on the architect's plan. As to the weepholes I find on a balance of probabilities that the work was incomplete not defective. In any event had notice of same been given it could have been corrected. In this regard however I accept Mr Hayes' evidence that there were weepholes.

[91] Finally, I find that there is no distinction made in the contract, nor any factual differentiation to be drawn, between, a budget in the contract and an actual budget. Once the budget was agreed it would be the benchmark of the contractual performance. Thereafter there might be variations but not a new budget. I find that the Claimants and Defendant at all material times intended to recast the

contractually approved budget once it was determined that the infrastructural work had to be redesigned. The Defendant, for reasons best known to itself, failed neglected and/or refused to involve the 2nd Claimant in that process. I find as a fact that this was contrary to the parties' intentions and mutual agreement. I find also that the 2nd Claimant delivered all necessary documentation to the Defendant. The refusal to pay due to non-delivery of documents was a pretext and nothing more.

CONTRACTUAL PROVISIONS

[92] There are two contracts The first in time was executed between the 1st Claimant the Defendant and Morrison Financial Mortgage Corporation on the 11th October 2016. The provisions most pertinent for my decision are now quoted:

> *"**PROJECT MANAGEMENT CONTRACT*** [exhibit 1 page 7 et seq]
> *MEMORANDUM OF AGREEMENT*
> *made the 11th day of October, 2016*
>
> *……..*
>
> ***Recitals***
> *WHEREAS Edgehill is the registered owner of a certain parcel of land comprised of approximated 63 acres located on Mango Valley Road in the Parish of St. Mary, Jamaica, hereinafter referred to as "the Property";*
> *AND WHEREAS Edgehill has created a plan of development of the Property, which plan envisages a subdivision of title, installation of infrastructure, and the erection of approximately 297 single family residences in a gated community to include a club house and certain other amenities, hereinafter referred to as "the Project";*
> *AND WHEREAS Morrison Financial has agreed to provide financing for the completion of the Project, subject to repayment of the financing being secured by a first mortgage charge registered against the Property;*
> *AND WHEREAS, at the time of making this contract, the aforesaid first mortgage charge is already in place, financing has been*

partially advanced, and some development and construction work has already been completed;

AND WHEREAS Edgehill wishes to engage the services of a professional and experienced development and construction management company to execute and be responsible for all aspects of the further development and construction of the Project until completion; and

AND WHEREAS CDS represents itself as being an entity with the necessary experience and competencies to fulfill the engagement sought by Edgehill;

LET THIS DOCUMENT EVIDENCE that, in exchange for the payment of consideration in the amount of USD$1.00 and other good and valuable consideration, including the mutual covenants contained herein, Edgehill, CDS and Morrison Financial, each being a "Party" hereto, and collectively referred to hereinafter as "the Parties", hereby agree as follows:

1.0 Engagement

1.01 CDS is hereby appointed as manager of the further development and construction of the Project, a role hereinafter referred to as "Project Manager";

1.02 As Project Manager, the role of CDS shall be to advise in relation to, and oversee the execution of, all aspects of the further development and construction of the Project. Without limiting the generality of the foregoing, this shall include:

(a) advising with respect to the preparation of a Business Plan for the Project, as more particularly detailed and for the purpose described in Clause 2.00 below;

(b) negotiating and obtaining the renewal of, or obtaining afresh where applicable, all necessary government approvals; (c) advising in respect to and sourcing qualified subcontractors as needed, and negotiating, preparing and presenting for signature by

Edgehill contracts for the engagement of the same;

(d) supervising the work of all contractors and subcontractors on site to ensure that it is performed in a good and workmanlike manner in accordance with the approved designs and specifications pertaining to the Project;

(e) ensuring site security and assuming responsibility, directly or indirectly, for all materials delivered to the site, pending installation indirectly and thereafter until conveyance to the homeowner in each case;

(f) ensuring that construction of the Project remains on schedule in accordance with the Business Plan;

(g) ensuring compliance with all laws and regulations pertaining to the Project and the completion thereof, including, but not limited to, laws and regulations pertaining to the employment or engagement of human resources and worker safety;

(h) co-operating with Edgehill's appointed sales and marketing representatives in the facilitation of sales, the sale of upgrades, the implementation of any change orders, and, in general, ensuring satisfactory conveyance of each home to the purchaser;

(i) ensuring that the quality of the product built and delivered to the homeowners, and all Project amenities, are constructed in a good and workmanlike manner, conform to what the customer in each case has purchased, and meet the quality standard that a customer purchasing a home in the price range of those comprising the Project would reasonably expect;

(j) resolving all post-delivery customer disputes in a timely and professional manner; and

(k) reporting throughout to Edgehill and Morrison Financial in accordance with the provisions of Clause 3.00 below.

2.00 The Budget

2.01 An important first step in the execution of this Agreement shall be the completion of a comprehensive costs budget for the Project, herein referred to as "the Budget". Based on realistic and provable figures, the Budget shall detail all costs of any nature and kind

whatsoever to be incurred in the further development and construction of the Project;

2.02 The Parties shall work diligently and in good faith to complete the Budget within sixty days after the execution of this Agreement. This process will require, and shall include, consultation with Prestige Realty, the company retained for sales and marketing of the Project. Once completed and agreed by all of the Parties, the Budget shall be acknowledged in writing and be annexed to and form an integral part of this Agreement.

2.03 The purpose of the Budget shall be to set the expectations of the Parties and to set the parameters pursuant to which CDS shall be entitled to an enhancement, or subject to a reduction, of the remuneration to which it would otherwise be entitled hereunder, in accordance with the Performance Addition/Deduction component of the remuneration provisions detailed in Subclause 4.01(c); 2.04 Whereas Edgehill and Morrison Financial have tendered a draft business plan which includes an estimate of projected costs, they acknowledge that the estimate of projected costs contained therein is incomplete and not ready to be adopted as the Budget for the purposes of this Agreement. It is expected, however, that, going forward, CDS will lead the exercise of recommending appropriate amendments to this estimate of projected costs such that the ultimate product may be adopted as the Budget for the purposes of this Agreement. Completion of the Budget shall include reviewing all costs to ensure that the estimates are realistic and obtaining quotations from contractors and subcontractors where appropriate, and particularly in the case of items representing more than ten percent of the overall budget. It shall also include a projection of the time frame (Gantt Chart) and cash-flow for the Project;

2.05 The purpose of the involvement of CDS in the completion of the Budget is to ensure, among other things, that the resulting product is reasonable and provides a fair opportunity for CDS to avoid a reduction of the Deferred Payment to which it shall be entitled under Subclause 4.01(b) below, as well as a fair opportunity

for CDS to earn an enhancement of the said Deferred Payment, all in accordance with Subclause 4.01(c) below. In the event of any dispute in the application of these provisions, it shall not be available for CDS to say that either Edgehill or Morrison Financial set unrealistic or unreasonable expectations that CDS did not endorse.

2.06 In the event that, despite mutual efforts undertaken in good faith and with reasonableness, the Parties are unable to agree on an estimate of projected costs to constitute the Budget for the purposes of this Agreement, either Party may give notice of its desire to terminate this Agreement, whereupon it shall be terminated, with all Parties absorbing their own costs and all rights and obligations hereunder becoming immediately null and void.

……..

4.00 Remuneration

4.01 The remuneration to which CDS shall be entitled under this Agreement shall be comprised of three components as follows:

(a) Regular Payments: Throughout the period of completion of the Project, commencing upon execution of this Agreement and continuing for a maximum of twenty-four months, CDS shall be paid $51,000.00 per month in arrears on the fifth day of the month following. The only requirement for continuation of these payments shall be that Morrison Financial remain confident that CDS is continuing to attend, in a sufficiently dedicated fashion, to advancement and construction of the Project and to honour its obligations and duties hereunder. With that condition being met, and subject to the provisions of Subclause 4.02 below, these payments would continue until the earlier of substantial completion of the Project and the expiry of 24 months (i.e., until a maximum of $1,224,000 has been paid);

(b) Deferred Payment: In addition to the Regular Payments described in Suclause (sic) 4.01(a) immediately above, upon the final closing and delivery of each home, $3,909.00 of the sale proceeds shall be deposited into an interest-bearing trust account

to be held by Morrison Financial, but legally for the benefit of CDS. The aggregate, cumulative amount of $1,160,973.00, plus interest earned, shall be paid to CDS in instalments, the amount and timing of which shall be agreed as part of the process of finalizing the Budget;

(c) Performance Addition/Deduction: The Deferred Payment described in Subclause 4.01(b) immediately above shall be subject to adjustment as follows:

(i) In the event that ultimately total costs of the Project are less than 90% of what was projected in the Budget, CDS shall be entitled to an additional payment equal to one-half of the difference; and

(ii) In the event that ultimately total costs of the Project are greater than 110% of what was projected in the Budget, CDS shall suffer a deduction of one-half of the difference.

……..

……..

7.04 Termination for Cause: Edgehill shall be at liberty to terminate this Agreement without notice at any time for cause, "cause" meaning, in the case of CDS and for the purposes of this provision, unequivocal evidence of dishonesty, gross negligence or reckless indifference in the performance of its duties, which, after presentment and discussion has not been explained in a manner satisfactory to Edgehill. Without limiting the remedies to which Edgehill, and possibly Morrison Financial, would otherwise be entitled, the termination of CDS for cause shall result in forfeiture of any benefits pursuant to this Agreement not already paid, including forfeiture of and remaining Deferred Payment accruing pursuant to Subclause 4.01(b).

7.05 Termination Without Cause: Edgehill may terminate the engagement of CDS hereunder without cause by giving a minimum thirty days' days' notice in writing, but, in this case, shall be liable to account to CDS for a reasonable share of the Deferred Payment accruing pursuant to Subclause 4.01(b), having regard to the timing of the termination, the amount of services provided up to the date of termination, the physical and financial status of the Project and how much would otherwise have been earned, applying proportionality in all of the above. If the Parties cannot agree as to the amount to be allocated to CDS in such circumstances, the matter shall be referred to for determination pursuant to the Dispute Resolution provisions of this Agreement described in Subclause 7.06 immediately below.

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7.11 Entire Agreement: This Agreement, including the Budget to be annexed hereto, shall constitute the entire agreement of the Parties in respect to the subject matter hereof. No representation, warranty or other communication made in the course of negotiations or otherwise, written or oral, shall be enforceable in relation to the subject matter hereof if it is not expressly referred to or contained herein."

[93] The construction contract is between the 1st Claimant and the Defendant. It is common ground that it was signed on the 13th March 2017. The general conditions of contract are those prepared by the "*The Federation Internationale des Ingenieurs-Conseils (FIDIC)"* and published in 1999, exhibit 2 page 6 et seq. I extract, in the interest of keeping this judgment within manageable proportions, only some of the clauses relevant to the issues before me:

*"**CONTRACT AGREEMENT*** [exhibit 2 page 3]

The Employer and the Contractor agree as follows:

1. In this Agreement words and expressions shall have the same meanings as are respectively assigned to them in the Conditions of Contract hereinafter referred to.

2. The following documents shall be deemed to form and be read and construed as part of this Agreement:

(a) The Letter of Tender dated

(b) The Conditions of Contract

(c) The Specification

(d) The Drawings listed in the Appendix V, and (e) The completed Schedules.

……

GENERAL CONDITIONS [exhibit 2 page 12 et seq]

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4.12 Unforeseeable Physical Conditions

In this Sub-Clause, "physical conditions" means natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydro-logical conditions but excluding climatic conditions.

If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable.

This notice shall describe the physical conditions, so that they can be inspected by the Engineer, and shall set out the reasons why the Contractor considers them to be Unforeseeable. The Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions, and shall comply with any instructions which the Engineer may give. If an instruction constitutes a Variation, Clause 13 [Variations and Adjustments] shall apply.

If and to the extent that the Contractor encounters physical conditions which are Unforeseeable, gives such a notice, and suffers delay and/or incurs Cost due to these conditions, the

Contractor shall be entitled subject to Sub-Clause 20.1

[Contractor's Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be included in the Contract Price.

After receiving such notice and inspecting and/or investigating these physical conditions, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) whether and (if so) to what extent these physical conditions were Unforeseeable, and (ii) the matters described in sub-paragraphs (a) and (b) above related to this extent.

However, before additional Cost is finally agreed or determined under sub-paragraph (ii), the Engineer may also review whether other physical conditions in similar parts of the Works (if any) were more favourable than could reasonably have been foreseen when the Contractor submitted the Tender. If and to the extent that these more favourable conditions were encountered, the Engineer may proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the reductions in Cost which were due to these conditions, which may be included (as deductions) in the Contract Price and Payment Certificates. However, the net effect of all adjustments under sub-paragraph (b) and all these reductions, for all the physical conditions encountered in similar parts of the Works, shall not result in a net reduction in the Contract Price. The Engineer may take account of any evidence of the physical conditions foreseen by the Contractor when submitting the Tender, which may be made available by the Contractor, but shall not be bound by any such evidence.

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8.4 Extension of Time for Completion

The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:

(a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]) or other substantial change in the quantity of an item of work included in the Contract,

(b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions, (c) exceptionally adverse climatic conditions,

(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or

(e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor's Claims]. When determining each extension of time under Sub-Clause 20.1, the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time.

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***8.6 Rate of Progress** If,*

at any time:

(a) actual progress is too slow to complete within the Time for Completion, and/or

(b) progress has fallen (or will fall) behind the current programme under Sub-Clause 8.3 [Programme],

other than as a result of a cause listed in Sub-Clause 8.4 [Extension of Time for Completion], then the Engineer may instruct the Contractor to submit, under Sub-Clause 8.3 [Programme], a revised

programme and supporting report describing the revised methods which the Contractor proposes to adopt in order to expedite progress and complete within the Time for Completion. Unless the Engineer notifies otherwise, the Contractor shall adopt these revised methods, which may require increases in the working hours and/or in the numbers of Contractor's Personnel and/or Goods, at the risk and cost of the Contractor. If these revised methods cause the Employer to incur additional costs, the Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay these costs to the Employer, in addition to delay damages (if any) under Sub-Clause 8.7 below.

8.7 Delay Damages

If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Appendix to Tender.

These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by Employer] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract.

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9.1 Contractor's Obligations

The Contractor shall carry out the Tests on Completion in accordance with this Clause and Sub-Clause 7.4 [Testing], after

providing the documents in accordance with sub-paragraph (d) of Sub-Clause 4.1 [Contractor's General Obligations].

The Contractor shall give to the Engineer not less than 21 days' notice of the date after which the Contractor will be ready to carry out each of the Tests on Completion. Unless otherwise agreed, Tests on Completion shall be carried out within 14 days after this date, on such day or days as the Engineer shall instruct. In considering the results of the Tests on Completion, the Engineer shall make allowances for the effect of any use of the Works by the Employer on the performance or other characteristics of the Works.

As soon as the Works, or a Section, have passed any Test on Completion, the Contractor shall submit a certified report of the results of these Tests to the Engineer.

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11.1 Completion of Outstanding Work and Remedying Defects

In order that the Works and Contractor's Documents, and each Section, shall be in the condition required by the Contract (fair wear and tear excepted) by the expiry date of the relevant Defects Notification Period or as soon as practicable thereafter, the Contractor shall:

(a) complete any work which is outstanding on the date stated in a Taking-Over Certificate, within such reasonable time as is instructed by the Engineer, and

(b) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period for the Works or Section (as the case may be).

If a defect appears or damage occurs, the Contractor shall be notified accordingly, by (or on behalf of) the Employer.

11.2 Cost of Remedying Defects

All work referred to in sub-paragraph (b) of Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects] shall be

executed at the risk and cost of the Contractor, if and to the extent that the work is attributable to:

(a) any design for which the Contractor is responsible, (b) Plant, Materials or workmanship not being in accordance with the Contract, or

(c) failure by the Contractor to comply with any other obligation. If and to the extent that such work is attributable to any other cause, the Contractor shall be notified promptly by (or on behalf of) the Employer, and Sub-Clause 13.3 [Variation Procedure] shall apply.

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11.4 Failure to Remedy Defects

If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of this date.

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14.6 Issue of Interim Payment Certificates

No amount will be certified or paid until the Employer has received and approved the Performance Security. Thereafter, the Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

However, prior to issuing the Taking-Over Certificate for the Works, the Engineer shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Appendix to Tender. In this event, the Engineer shall give notice to the Contractor accordingly. An Interim Payment Certificate shall not be withheld for any other reason, although:

(a) if any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or

(b) if the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction.

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14.9 Payment of Retention Money

When the Taking-Over Certificate has been issued for the Works, the first half of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate is issued for a Section or part of the Works, a proportion of the Retention Money shall be certified and paid. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section or part, by the estimated final Contract Price.

Promptly after the latest of the expiry dates of the Defects Notification Periods, the outstanding balance of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate was issued for a Section, a proportion of the second half of the Retention Money shall be certified and paid promptly after the expiry date of the Defects Notification Period for the Section. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section by the estimated final Contract Price.

However, if any work remains to be executed under Clause 11 [Defects Liability], the Engineer shall be entitled to withhold certification of the estimated cost of this work until it has been executed.

When calculating these proportions, no account shall be taken of any adjustments under Sub-Clause 13.7 [Adjustments for Changes in Legislation] and Sub-Clause 13.8 [Adjustments for Changes in Cost].

14.10 Statement at Completion

Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Engineer six copies of a Statement at completion with supporting documents, in accordance with Sub-Clause 14.3 [Application for Interim Payment Certificates], showing:

(a) the value of all work done in accordance with the Contract up to the date stated in the Taking-Over Certificate for the Works, (b) any further sums which the Contractor considers to be due, and (c) an estimate of any other amounts which the Contractor considers will become due to him under the Contract. Estimated amounts shall be shown separately in this Statement at completion. The Engineer shall then certify in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates].

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14.13 Issue of Final Payment Certificate

Within 28 days after receiving the Final Statement and written discharge in accordance with Sub-Clause 14.11 [Application for Final Payment Certificate) and Sub-Clause 14.12 [Discharge], the Engineer shall issue, to the Employer, the Final Payment Certificate which shall state:

(a) the amount which is finally due, and

(b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is

entitled, the balance (if any) due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be.

If the Contractor has not applied for a Final Payment Certificate in accordance with Sub-Clause 14.11 [Application for Final Payment Certificate] and Sub-Clause 14.12 [Discharge], the Engineer shall request the Contractor to do so. If the Contractor fails to submit an application within a period of 28 days, the Engineer shall issue the Final Payment Certificate for such amount as he fairly determines to be due.

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Termination by Employer 15.1 Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract if the Contractor:

(a) fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1 [Notice to Correct],

(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,

(c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or

(ii) to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it,

(d) subcontracts the whole of the Works or assigns the Contract without the required agreement,

(e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events, or

(f) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:

(i) for doing or forbearing to do any action in relation to the Contract, or

(ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract,

or if any of the Contractor's Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (f).

However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination.

In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of subparagraph (e) or (f), the Employer may by notice terminate the Contract immediately.

The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor, The Employer shall then give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

15.3 Valuation at Date of Termination

As soon as practicable after a notice of termination under SubClause 15.2 [Termination by Employer] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.

15.4 Payment after Termination

After a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Employer may:

(a) proceed in accordance with Sub-Clause 2.5 [Employer's Claims],

(b) withhold further payments to the Contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established, and/or

(c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation at Date of Termination]. After recovering any

such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

15.5 Employer's Entitlement to Termination

The Employer shall be entitled to terminate the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.

After this termination, the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment] and shall be paid in accordance with SubClause 19.6 [Optional Termination, Payment and Release].

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Bill No.100 GENERAL CLAUSES AND PRELIMINARY ITEMS

[exhibit 2 page 155 et seq].

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Definitions:

The following shall be as defined for the duration of this contract:

The Contract Documents consists of the following, including all modifications thereof incorporated in the Documents before their execution:

The Articles of Agreement and Conditions of Contract

The Drawings

The Specifications

The priced Bill of Quantities (after arithmetical corrections)

The Employer, the Contractor and the Project Manager are those mentioned as such in the Agreement. They are treated throughout

the Contract Documents as if each were of the singular number and masculine gender.

Written notice shall be deemed to have been duly served if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered mail to the last business address known to him who gives the notice.

All time limits stated in the Contract Documents are the essence of the Contract.

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Contractor to obtain own information

The Contractor shall visit and examine the Site and satisfy himself as to the local conditions, accessibility of the Site, nature of the soil, full extent and character of the project, availability and cost of labour and materials and the like and shall obtain his own information generally on all matters and conditions affecting the proper execution of the works. No extra charge in relation to any claims due to lack of knowledge in respect of any misunderstanding or incorrect information on any of these points or on the grounds of insufficient information will be allowed.

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Defective or Imperfect Work

If, at any time during the progress of the Works, the Architect/Contract Administrator shall disapprove of any materials employed, the Contractor is to remove forthwith such materials from the Site and to substitute materials of approved quality. Where any portion of the work executed shall be considered by the Project Manager/Contract Administrator to be defective or imperfect or not in accordance with the terms of the Contract, such defective or imperfect work shall be removed forthwith and the work re-executed in an approved manner at the Contractor's expense.

Re-examination of questioned work may be ordered by the Architect/Contract Administrator and if so ordered the work must be

uncovered by the Contractor. If such work be found in accordance with the Contract Documents, the Employer shall pay the cost of reexamination and replacement. If such work be found not in accordance with the Contract Documents the Contractor shall pay such cost, unless it is found that the defect in the work was caused by a Contractor previously employed by the Employer, who shall pay such cost in that event.

……."

ANALYSIS OF LIABILITY

[94] It is manifest that the Defendant paid little regard to the contractual provisions for termination in either contract. Similarly with the provisions relating to defects or delays and relevant notices, they seemed to have been honoured more in the breach than the observance. It seems to me that the Defendant ought not to profit or otherwise benefit from its failure to abide the contractual terms. So for example, by not affording the 1st Claimant an opportunity to consider the or any alleged defects, and to be able to remedy any such, the Defendant ought not to be given the benefit of any doubts in that regard. In this matter I am satisfied, as indicated in paragraphs 86 to 91 above, that most of the Defendant's complaints were unmeritorious or, related to issues easily rectified and/or, concerned incomplete rather than defective work.

[95] On the matter of the soil condition as revealed by the topographical ground survey the 1st Claimant's contract clearly provided that they had an obligation to verify that before tendering a price for the job. However, in this case neither Claimant is asking to vary the contract price and therefore that particular provision does not assist the Defendant's cause. The sequence of events explains why this is so and is another example of the parties not abiding the strict contractual provisions. The fact is that very early after the 2nd Claimant's contract was signed, and before the 1st Claimant's contract, the Defendant was made aware that its topographical survey was inadequate for the purpose and a new one would need to be done. Upon it being done all parties realized that new infrastructure drawings were

required as well as a new budget. As I have found it was mutually agreed and recognized that this eventuality was the fault of none of the parties. That is why at no time was there any effort to have either Claimant bear the additional costs in time or treasure. There was no notice from the engineer in that regard. Instead, the Defendant decided to reduce the units to be constructed but kept the same project price to be paid to the Claimants, at any rate there is no evidence of the price being changed by agreement or otherwise. The Defendant unilaterally changed the Claimants' construction plan. Phase one was to be done before work on the other phases commenced or continued. The sale of units was apparently to fund the continued construction. This was not the original intent and the original architect on the project, giving evidence for the 1st Claimant said so. The Defendant compounds the problems by taking several months to approve the redesign of infrastructure works.

[96] The other major departure by the Defendant was to insert Dunsire into the mix. Effectively undermining the role of the 2nd Claimant and reducing direct contact with the Defendant. Dunsire, representing the Defendant, undertook sourcing of various items in an effort to save costs. However, this proved otherwise as the delays involved and the adequacy of supplies were compounded. It also relieved the 1st Claimant of responsibilities in that regard. The insertion of Dunsire was also outside the realm of the contract. When the stated "*final"* extension of time was granted, to the 30th September 2019, the Defendant did not meet the conditions necessary to enable the 1st Claimant to meet that deadline, see exhibit 1 page 98. In all these circumstances, the Claimants are entitled to judgment. The Defendant has not satisfied me, on a balance of probabilities, that it is entitled to anything on the counterclaim which will stand dismissed. I therefore turn to an assessment of damages.

ASSESSMENT OF DAMAGES

[97] With regard to the 2nd Claimant the Defendant withdrew its challenge to invoices # 30 and 31, see paragraph 13 above. The amount of US$334,360.24 is also claimed, this relates to the deferred payment. Given the several mutual departures from the project scope and budget an assessment in the round is appropriate. It seems to me fair and reasonable to award the 2nd Claimant 80 percent of the deferred payment payable as per contract.

[98] The 1st Claimant's claim can be approached in similar vein. There will be an award for unpaid amounts for certificates of payment numbers 29 and 30. As regards the retention amount I award 80 percent of that, the other 20 percent reflects any minor defects or incomplete work at the time of termination. The claim to wrongful termination and loss of profits is more problematic. Damages for a breach of contract put the innocent party in the position it would have been in had the contract not been breached. In this case the contract provided for termination by notice and a procedure for assessment and measurement as at that date. Damages, of a general nature, ought to reflect that which the 1st Claimant lost because those procedures were not followed. Therefore, the 1st Claimant did not lose the profit it would have made had the contract for constructing 300 houses continued to completion. The 1st Claimant lost the opportunity to receive the requisite notice, to assess the value of work and, to correct any alleged defective work. The evidence has not provided much assistance in that regard. The fair and just thing is to compensate for, as best as possible, the value of work done by the 1st Claimant, as well as the retention up to that time, less reasonable provision for corrections. The demobilization costs claimed would have been incurred even if the correct termination procedure been adopted and is therefore not a loss consequent to the breach.

[99] Submissions were made for interest to be awarded at 3% above the discount rate of the Central Bank, see 1st Claimant's submissions filed 29th October 2024 at paragraph 173. However, I am not satisfied that sufficient evidence is before me to support such an award. I will award interest pursuant to the provisions of the

Law Reform (Miscellaneous Provisions) Act. This is fair as damages are awarded in the currency of the United States.

DECISION

[100] There is therefore judgment for the 1st and 2nd Claimants against the Defendant as follows:

(1) For the 1st Claimant

(i)	Certificates #29 and 30	US$1,317,185.18
(ii)	80 percent retention	US$1,543,477.85
	Total	US$ 2,860,663.03

(2) For the 2nd Claimant

(i)	Invoice # 30 and 31	US$69,096.77
(ii)	80 percent of deferred payment	US$ 267,488.19
	Total	US$ 336,584.96

(3) The Defendant's counterclaim is dismissed.

(4) Interest will run on the damages from the date of breach, being, the 30th September 2019 for the 1st Claimant and, the 13th June 2019 for the 2nd Claimant, at the rate of 4 percent per annum until payment.

(5) Costs to the 1st and 2nd Claimants to be taxed if not agreed.

David Batts Puisne Judge